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ARTICLES

PRIVACY IN PUERTO RICO AND THE MADMAN'S PLIGHT: DECISIONS

HIRAM A. MELÉNDEZ-JUARBE*

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You ask me how I became a madman. It happened thus: One day, long before many gods were born, I woke from a deep sleep and found all my masks were stolen,—the seven masks I have fashioned and worn in seven lives,—I ran maskless through the crowded streets shouting, “Thieves, thieves, the cursed thieves!”

Men and women laughed at me and some ran to their houses in fear.

And when I reached the market place, a youth standing on a house-top cried, “He is a madman!” I looked up to behold him; the sun kissed my own naked face for the first time. For the first time the sun kissed my own naked face and my soul was inflamed with love for the sun, and I wanted my masks no more. And as if in a trance I cried, “Blessed, blessed are the thieves who stole my masks!”

Thus I became a madman.

And I have found both freedom and safety in my madness; the freedom of loneliness and the safety from being understood, for those who understand us enslave something in us.

But let me not be too proud of my safety. Not even a thief in a jail is safe from another thief. – Khalil Gibran, *The Madman* (1918)¹

INTRODUCTION

With the thieves' transgression began the Madman's agonizing path to freedom.

As he faced sunlight, he realized the value of controlling the projection of his identity to others. In seven or eight different ways he modified with elaborate masks who he was and how he wanted us to know him. Modulating the information that flowed from him, our friend both outwardly *expressed* his chosen identities and inwardly *refrained* from sharing other elements of his personality depending on context.

This theft was an assault on the Madman's dignity. He felt naked, powerless and unprotected from the comfort zone he had created to shield himself from a fast-paced, complicated and multidimensional society. With different demands from diverse social groups, he needed to control where to invest his most personal and emotionally demanding thoughts and experiences, the most taxing of which would be left to the most personal settings, either alone or with his family and friends in the down-time of night.

To know something about somebody is an exercise of power. It enables control and facilitates naming and categorizing.² Conversely, not being able to control

1. KHALIL GIBRAN, *THE MADMAN: HIS PARABLES AND POEMS* (Alfred A. Knopf 1974) (translation slightly modified according to I KHALIL GIBRÁN, *OBRAS COMPLETAS* 209 (Edicomunicación 1988)).

2. See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* 184-185 (1977); MICHEL FOUCAULT, *LA VERDAD Y LAS FORMAS JURÍDICAS* 82-114 (1983)

The examination combines the techniques of an observing hierarchy and those of a normalizing judgment. It is a normalizing gaze, a surveillance that makes it possible to qualify, to classify and to punish. It establishes over individuals a visibility through which one differentiates them and judges them. That is why, in all the mechanisms of discipline, the examination is highly ritualized. In it are combined the ceremony of power and the form of the experiment, the deployment of force and the establishment of truth. At the heart of the procedure of discipline, it manifests the subjection of those who are perceived as objects and the objectification of those who are subjected. The superimposition of the power relations and knowledge regulations assumes in the examination all its visible brilliance.

Id; REG WHITAKER, *THE END OF PRIVACY* 40-42 (1999) ("Capitalist enterprise, in short, has been and continues to be a primary site not only for the exercise of surveillance, but also a site for technological and organizational innovations in surveillance The modern nation state involves the extension of sovereignty as the monopoly of the legitimate exercise of coercion over a given territory All of this has required knowledge and especially reflective knowledge—that is, the increased capacity of the state to monitor itself and its activities It is always knowledge for the sake of control, and it has most often been in the service of the state.").

what is known and who knows information about us is a power-loss. After the agony of vulnerability, in madness our friend found what he thought was freedom from others' knowledge and understanding of his self. Grappling with the awkward feeling of adopting a category imposed by others (madman), he embraced the label because it provided his eighth mask: the one not known or understood by others—the one with the potential to elude others' ability to control the expression of his identity. Or at least, that's what he believed.

In a way, we are all like our friend the Madman. Through many different mechanisms we shape our identities and select how to project them.³ Those identity-formation mechanisms include *decisions* we make regarding the way we choose to live our lives in fundamental matters, and the *control of information* we choose to expose. This ability, particularly when reinforced by law, enables us to curb those technologies of power that stem from others' efforts to affect the way we produce our identities, either by (1) commandeering the way we exercise those decisions or (2) providing knowledge, control and dissemination of personal information. Constitutional law recognizes such interests within the right to privacy. Privacy, in sum, protects our efforts to construct our identities either by controlling the flow of personal information or by engaging in certain fundamental decisions. The latter of these mechanisms is the focus of this Article.

A. ABOUT MASKS, IDENTITY AND THE LAW

Who was the Madman? What identities were the stolen masks helping him define? We can only imagine. On the other hand, we can also only speculate as to the identity of the thieves and their intentions. Why did they want those specific masks? Did they have an intrinsic value worth stealing? Or were the thieves just interested in impeding the Madman from defining himself in some peculiar way? Were the thieves “the law” trying to impose certain masks or hinder identities?

Masks are used throughout this Article to represent mechanisms for identity definition. They are symbols of our constructed identities. To the extent that privacy interests are constitutional devices used for self-definitional purposes, these constitutional rights are—metaphorically speaking—highly important and very powerful mask-making tools. Many of these masks, however, may or may not conflict with existing legal categories. And these legal categories, whether we want it or not, may also have a say about how our identities get constructed.

As explained by Efrén Rivera-Ramos, legal categories sometimes help define our identities:

Individuals and groups develop self-perceptions and are defined by others with reference to factors such as gender, race, skin color, social origin, age, place of birth, religious beliefs, modes of sexuality, political affiliation, professional or occupational status, place of

3. See generally ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1973).

residence, personality traits and characteristics, and even musical and literary tastes. *Ascription to legal categories that assign rights and obligations also contribute[s], at times only momentarily, others in a more durable fashion, to shape self-views and ways of naming oneself.*⁴

Legal categories' constitutive effects are not limited to the construction of our consciousness. The law, more broadly speaking, also constitutes social reality in general. As Pierre Bourdieu stated,

Law is the quintessential form of the symbolic power of naming that creates the things named, and creates social groups in particular. It confers upon the reality which arises from its classificatory operations the maximum permanence that any social entity has the power to confer upon another, the permanence which we attribute to objects.

The law is the quintessential form of "active" discourse, able by its own operation to produce its effects. It would not be excessive to say that it creates the social world, but only if we remember that it is this world which first creates the law.⁵

We are in a reciprocal relation with the law and legal categories: Although we shape the law, the law also shapes the content of our consciousness and, with that, our identity.⁶ It is in this sense that legal categories—here called *legal masks* (as opposed to those self-crafted masks)—have a constitutive effect on our consciousness. "Each category embodies an identity: citizen, consumer, creditor, spouse, accused or victim. Each category defines rights and imposes duties to the agents subsumed within it."⁷ They affect the contents of our consciousness either directly, imposing normative prescriptions on the subject, or indirectly, by creating a context for social relations that structures and constrains individual quotidian action.⁸

Our interaction with the law may profoundly affect our identities. We may define ourselves by rejecting legal masks and sometimes by adopting them, fully or partially. When we choose a legal category and put on that *legal mask*, we define part of our identity in a ready-made fashion. We adopt and incorporate it "as-is," for in many cases we have little opportunity to tinker and redefine its meaning.

In short, masks, legal or otherwise, help us shape our identities. Some masks we make from scratch while others are made by the law. To the extent that legal

4. EFRÉN RIVERA-RAMOS, THE LEGAL CONSTRUCTION OF IDENTITY: THE JUDICIAL AND SOCIAL LEGACY OF AMERICAN COLONIALISM IN PUERTO RICO 170-171 (2001).

5. Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HST. L. J. 805, 838-39 (1987).

6. *Id.*; Efrén Rivera-Ramos, *Derecho y Subjetividad*, 5-6 FUNDAMENTOS 124 (1997-1998).

7. *Id.* at 128.

8. *Id.* at 131-32; RIVERA-RAMOS, *supra* note 4, at 21.

masks may conflict with our efforts to define our individual identities, these efforts may be hampered by the law's interest in defining the identity of the community as a whole. Therefore, some custom-made masks may be tolerated or encouraged by the law (like being a "parent"); while in other cases, the law will prohibit them (as in the case of "sodomy," at least until 2003). In other instances, the law need not force us; it may more subtly promote its interests by requiring us to adopt legal masks as a condition of engaging in highly important activities (as in the case where the law conditions joint adoption upon marriage, or when the law conditions marriage upon heterosexuality).

When our masks (and the decisions that produce them) conflict with governmental attempts to impede how we craft them or with the State's interest in imposing its legal masks, a constitutional challenge may arise. This Article is about such conflicts.

We may imagine our friend the Madman adopting several of those highly personal masks and the conflict the masks may present. We may imagine him trying to define himself, for example, as a spouse, or conversely, trying not to be perceived as one. As he tries to craft his masks in the context of sexual relations, his dying days, and other family relations, he will encounter many governmental efforts to either force him to comport to pre-existing legal categories or to give up his efforts to adopt his chosen masks. The resolution of these conflicts requires adequate constitutional guidelines. And it is the main objective of this Article to identify self-definition as a substantive criterion, through decisionmaking privacy, particularly for the Puerto Rican constitutional context.

B. NOTE ON SCOPE

Since this is a large piece and the argument here made comprises several parts, I take this opportunity to explain the article's limited scope within privacy law's extensive realm, its organization and main statement.

Privacy law in Puerto Rico is complex and polymorphous. Our legal system recognizes various layers of mechanisms to protect this right.

First, *constitutional law*—both American and Puerto Rican—protects (a) the right to control private information;⁹ (b) the right to make fundamental decisions;¹⁰ and (c) the right to be free from governmental unreasonable searches and seizures.¹¹

Second, *tort law* provides protection from the four classic privacy wrongs identified by Prosser as he interpreted Warren and Brandeis' legacy in United States common law: (a) intrusion upon seclusion or solitude; (b) public disclosure; (c) false light in the public eye; and (d) appropriation of name or

9. *Whalen v. Roe*, 429 U.S. 589 (1977); U.S. CONST. amend. XIV; P.R. CONST. art. II, § 8; *Arroyo v. Rattan Specialties Inc.*, 117 D.P.R. 35 (1986).

10. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

11. U.S. CONST. amend IV; P.R. CONST. art. II, § 10.

likeness.¹² This tort component in Puerto Rico has its source in both our general tort statute¹³ and our Constitution.¹⁴

Third, *statutory law* provides fragmented and sometimes insufficient protection against collection, use, and disclosure of personal information in areas such as health, finance, and labor law.¹⁵

Fourth, the control of personal information is affected by legal and constitutional *freedom of information rules*, inasmuch as they provide a context for the flow of private information between the government and the citizenry.¹⁶

Fifth, as Lessig would put it, *code*: In a world in which social relationships are framed by the architectural design of the technological context in which they develop, the way in which such frameworks are designed is essential. For example, the architecture of computer code makes possible the efficient collection and disclosure of personal information in e-mail conversations, electronic transactions or simply Internet browsing. The relevant software and hardware may be capable of protecting or eroding privacy interests with much

12. Restatement (Second) of Torts § 652C (1977); William Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

13. P.R. Civ. CODE, art. 1802, 31 L.P.R.A. §5141.

14. Colón v. Romero Barceló, 112 D.P.R. 573, 576 (1982); *Rattan*, 117 D.P.R. at 54-63.

15. See, e.g., Fair Credit Reporting Act of 1970, 15 U.S.C.A. §§ 1681-1681x (West, WESTLAW through P.L. 110-111); Privacy Act of 1974, 5 U.S.C.A. § 552a (West, WESTLAW through P.L. 110-111); Family and Educational Rights and Privacy Act of 1974, 20 U.S.C.A. §§ 1232g. (West, WESTLAW through P.L. 110-111); Right to Financial Privacy Act of 1978, 12 U.S.C.A. §§ 3401-3422 (West, WESTLAW through P.L. 110-111); Foreign Intelligence Surveillance Act of 1978, 15 U.S.C.A. §§ 1801-1811; Privacy Protection Act of 1980, 42 U.S.C.A. § 2000aa (West, WESTLAW through P.L. 110-111); Cable Communications Policy Act of 1984, 47 U.S.C.A. § 551 (West, WESTLAW through P.L. 110-111); Electronic Communications Privacy Act of 1986, 18 U.S.C.A. §§ 2510-2522, 2701-2709 (West, WESTLAW through P.L. 110-111); Computer Matching and Privacy Protection Act of 1988, 5 U.S.C.A. § 553a (West, WESTLAW through P.L. 110-111); Employee Polygraph Protection Act Of 1988, 29 U.S.C.A. §§ 2001-2009 (West, WESTLAW through P.L. 110-111); Video Privacy Protection Act of 1988, 18 U.S.C.A. §§ 2710-2711 (West, WESTLAW through P.L. 110-111); Telephone Consumer Protection Act of 1991, 47 U.S.C.A. § 227 (West, WESTLAW through P.L. 110-111); Driver's Privacy Protection Act of 1994, 18 U.S.C.A. §§ 2721-2725 (West, WESTLAW through P.L. 110-111); Health Insurance Portability and Accountability Act of 1996, 42 U.S.C.A §§ 1320d-1320d-8 (West, WESTLAW through P.L. 110-111); Identity Theft and Assumption Deterrence Act of 1998, 18 U.S.C.A. § 1028 (West, WESTLAW through P.L. 110-111); Children's Online Privacy Protection Act of 1998, 15 U.S.C.A. §§ 6501-6506 (West, WESTLAW through P.L. 110-111); Gramm-Leach-Bliley Act of 1999 (West, WESTLAW through P.L. 110-111), 15 U.S.C.A. §§ 6801-6809; CAN-SPAM Act of 2003 (West, WESTLAW through P.L. 110-111), 15 U.S.C.A. 7701; Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-495 (West, WESTLAW through P.L. 110-111); Video Voyeurism Prevention Act of 2004, 18 U.S.C.A. § 1801 (West, WESTLAW through P.L. 110-111). See generally SOLOVE, ROTENBERG & SCHWARTZ, INFORMATION PRIVACY LAW (2006).

16. Hiram A. Meléndez Juarbe, *Derecho Administrativo* 74 REV. JUR. UPR 531 at n. 8 (2005) (strongly relying on Daniel Solove's work to state that freedom of information rules must be rethought in light of the destabilization of information flows created by current technologies). See generally Yochai Benkler, *How (if at all) to Regulate the Internet: Net Regulation: Taking Stock and Looking Forward*, 71 U. COLO. L. REV. 1203 (2000); DANIEL J. SOLOVE, THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE 127-161 (2004).

more effectiveness than conventional legal norms. In this sense, “code is law.”¹⁷

In this Article I will not engage in a detailed discussion of all of these legal dimensions of privacy protection and how they may interact. Rather, I will hover above them as I propose identity-definition as an important political and constitutional value.

In sum, the main statement of this Article is the following: Our constitutional system embraces one very important constitutional value among many. The notion that individuals must have the right to define their identities, as fickle as those identities may be, is fundamental. One important constitutional hook on which this value hangs in U.S. and Puerto Rican constitutional law is decisionmaking privacy. Although the right of privacy—as well as the protection of individual dignity—is expressly protected in Puerto Rican constitutional law with a professed wider scope, the Supreme Court has not provided a coherent substantive and methodological approach to form this right’s contours. The final objective is to propose a substantive framework for the protection of decisionmaking privacy in Puerto Rico in tune with the Madman’s plight; that is, propose a coherent solution to protect individual choices as they empower persons to define their identities.

This argument is divided in three general parts. In Part I, I make the constitutional—and political—argument that decisionmaking privacy claims in United States constitutional law are primarily supported by identity-definition values.

In Part II, the Madman travels to Puerto Rico to see how his interest has, if at all, been treated in Puerto Rican case law. We will find that, even when the Constitution is spacious enough to encompass self-definitional interests, the Puerto Rico Supreme Court has not made a consistent effort to define this right’s boundaries. Rather, it has consciously abdicated its constitutional responsibilities. With the Madman’s perspective at the helm, I propose a substantive and methodological framework to address decisionmaking issues in Puerto Rico, while taking into account the Constitution’s text and history.

Finally, Part III presents the Madman’s outlook in action and puts into practice the proposed methodological and substantive approach in the context of a series of important self-definitional decisions relating to abortion, death, family relations and sexual orientation.

I. DECISIONMAKING PRIVACY: PRIVACY AND IDENTITY IN CONSTITUTIONAL DOCTRINE

What has been called the decisionmaking dimension of the right to privacy

17. LAWRENCE LESSIG, CODE: VERSION 2.0 (2006). See also Hiram A. Meléndez Juarbe, *La Constitución en Ceros y Unos: Un Acercamiento Digital al Derecho a la Intimidad y la Seguridad Pública*, 77 REV. JUR. UPR ____ (2008) (forthcoming) (proposing a constitutional review standard that takes into account technological architecture for privacy-invasive governmental action).

protects the ability of individuals to make certain kinds of highly important and personal decisions. The decisions protected by the U.S. Supreme Court since the 1920s—and under the rubric of privacy since 1965—cover several and diverse interests including contraception, abortion, procreation, and the so-called right to die, as well as the decision to enter into intimate relations such as marriage, same-sex sexual relations and other decisions regarding family life.¹⁸ This Part discusses the development of these privacy interests in order to understand how identity-formation values gradually settled into constitutional doctrine.

A. SUBSTANTIVE DUE PROCESS, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO PRIVACY

The Due Process Clause¹⁹ of the Fourteenth Amendment to the U.S. Constitution has been gradually embraced as a substantive protection of individual liberty against both the federal government and the states.²⁰ Its substantive use matured at the turn of

18. For a detailed discussion of this case law, see *infra* text accompanying notes 39-57 (contraception); 59-89, 351-387 (abortion); 388-427 (right to die); 428-492 (family relations); and 493-542 (sexual orientation).

19. The Fourteenth Amendment to the United States Constitution states in part that:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV § 1.

20. Before the enactment of the Fourteenth Amendment, the U.S. Supreme Court in 1833 held that the guarantees contained in the Bill of Rights of the Constitution were only applicable to the federal government and therefore not binding upon the states. *Barron v. Mayor and City of Baltimore*, 32 U.S. 243 (1833). But as a direct result of the Civil War, amendments Thirteen, Fourteen and Fifteen were enacted, changing the federal-state relations landscape. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 342 (1985); 1 LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 7-1, at 1295 (2000). In 1868 the Fourteenth Amendment was ratified. It straightforwardly prohibited the states from abridging privileges or immunities of the citizens of the United States and prohibited the denial to any person of the equal protection of the law and the due process of law. The substantive content of those guarantees and, thus, the substantive limitations that the federal Constitution imposes on state action have been, until this day, under constant development.

Despite being the most attractive clause for imposing a wide array of federal individual guarantees against the states, a few years after its entry into force, the Privileges and Immunities Clause was narrowly interpreted in *The Slaughter-House Cases*, 83 U.S. 36 (1873), and therefore deprived of most of its potential. See generally 1 TRIBE, *supra*, at §§ 7, 8; JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.2 at 404 (2000). Cf. *Saenz v. Roe*, 119 S. Ct. 1518 (1999) (holding that the Privileges and Immunities Clause of the Fourteenth Amendment includes the right to travel, which, in turn, includes the right to become a citizen of a state upon arrival and to have the same privileges as other citizens in that state such as welfare benefits). Moreover, the scope of the Equal Protection Clause was initially construed as applying only to racial discrimination. *The Slaughter-House Cases*, 83 U.S. 36 (1873); 1 TRIBE, *supra*, at §§ 7, 8. As a result, the Due Process Clause of the Fourteenth Amendment emerged as the main constitutional resource of substantive import to limit state encroachments of individual rights. 1 TRIBE, *supra*, at § 8-1, 1341-43; NOWAK & ROTUNDA, *supra*, at § 11.2, 406-08. Today this clause is the main constitutional clause through which federal rights are made applicable against the states, 1 TRIBE, *supra*, at § 8-1, 1334-35, either functioning as a conduit that channels against the states the specific guarantees contained in the first eight amendments or, independently, by imposing limitations upon them as the Supreme Court interprets the term *liberty* to encompass diverse substantive meanings

the century when the term *liberty* was thought to include not only freedom from physical restraint, but also contractual liberty and other non-economic liberties.²¹

Thus, as epitomized by the *Lochner* decision,²² the Court employed the Due Process Clause to substantively scrutinize and strike down economic legislation that unduly infringed the contracting parties' fundamental freedom to engage in private agreements.²³ Also, as the Court broadened the scope of the protected liberties in several cases during the 1920s, it struck down governmental intrusions into individual and family interests. Those cases served as the constitutional backbone for the heightened protection of modern privacy interests, and became direct precedents for the recognition of the right to privacy in *Griswold v. Connecticut* forty years later.

The flagship cases of non-economic liberty protection through the due process clause are *Meyer v. Nebraska*,²⁴ striking down a Nebraska statute that prohibited the teaching of foreign languages to children, and *Pierce v. Society of Sisters*,²⁵ invalidating an Oregon act compelling children to attend public schools.²⁶

not included within the text of those guarantees. Furthermore, pursuant to Section Five of the Fourteenth Amendment, Congress is empowered to enact legislation enforcing the substantive provisions of the amendment, which can validly abrogate the Eleventh Amendment's state sovereign immunity, *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). This authority has been recently limited to the enforcement of the substantive provisions of the amendment *only* as defined by the Supreme Court. In this view, Congress's power is limited to the enactment of laws that are *congruent* and *proportional* to the substantive meaning that the Court, and only the Court, has empowered itself to define. *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Tennessee v. Lane*, 541 U.S. 509 (2004).

21. *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897) ("The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.").

22. *Lochner v. New York*, 198 U.S. 45 (1905).

23. This attitude was a result of the orthodox confidence in the market as a neutral, self-executing and natural institution for the distribution of wealth, which deemed illegitimate any governmental effort that interfered with that supposedly neutral distributive process. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 33, 194-98 (1992). Also, the view that there was a sharp division between a public and a private realm gave an increased centrality to unfettered private and voluntary exchange between individuals through their free will. *Id.* at 206-08.

24. 262 U.S. 390 (1923).

25. 268 U.S. 510 (1925).

26. The Court in *Meyer* defined liberty broadly, including as central components some aspects of individual and family decisionmaking and autonomy that are quite close to current privacy notions.

While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, *to marry, establish a home and bring up children*, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

These liberty interests can be seen not only as protecting a personal sphere from state interference; they are more broadly protections against governmental efforts to commandeer individuals into imposed ways of life.²⁷ To the extent that the Nebraska statute was part of a post World War I anti-German sentiment and a product of an evident state standardization program,²⁸ the state's efforts to "foster a homogeneous people" became an important element of the decision.²⁹ Similarly, in *Pierce*, the Court emphasized the "liberty of parents and guardians to direct the upbringing and education of children under their control."³⁰ This fundamental liberty opposes "any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; *those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.*"³¹

In the late 1930s, the Court changed its attitude regarding the constitutional scrutiny of economic legislation and recognized greater authority to the political branches to enact such laws. This "switch in time" heralded the demise of the exacting substantive examination of legislative goals and means that characterized the Court's substantive due process jurisprudence throughout the *Lochner era*.³² But the non-economic substantive interests protected by *Meyer* and *Pierce*

Meyer, 262 U.S. at 399 (emphasis added).

27. See Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 743 n.34 (1989).

28. Barbara Bennett Woodhouse, *Who owns the Child?: Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1004 (1992); D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW: CASES AND MATERIALS* 22 (1998). This anti-German sentiment was rooted in deeper conflicts between efforts to articulate an American national identity and cultural pluralism. These conflicts were evident "in the long-standing tensions between English-speaking settlers of the Midwest and the large German, Polish, and Scandinavian communities in these states. These immigrant groups often formed isolated cultural enclaves with clubs, parochial schools, ethnic parishes, banks, stores, and insurance companies in which all business was conducted in the language of the home country. Their American-born neighbors, coming from a tradition that mixed the meliorative, unifying strains of populism and progressivism with a nativist distrust for anything foreign, this failure to assimilate seemed at once a threat and a challenge for progressive reform." Woodhouse, *supra*, at 1004. In particular, the "growth of private religious schools, importing teachers from the Old Country who taught in German, Polish, Italian, or Czech, posed a particular threat to a cherished agent of social equality and acculturation—the common school movement." *Id.* at 1005. Thus, by 1923, thirty-one states had enacted laws making English the sole language of instruction in public or in all schools. *Id.* at 1004.

29. *Meyer*, 262 U.S. at 402. See TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-6, at 1319 (1988).

30. *Pierce*, 268 U.S. at 534-35.

31. *Id.* at 535 (emphasis added).

32. *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) (upholding a state minimum wage law for women). Although in *Nebbia v. New York*, 291 U.S. 502 (1934) (upholding a state regulation fixing the price of milk), the Court suggested the adoption of this deferential approach, between *Nebbia* and *Parish*, the Court struck down several New Deal laws for exceeding Congressional constitutional powers. KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 472-73 (14th ed. 2001). *Parish* was decided in the midst of a national controversy regarding President Roosevelt's Court Packing Plan, which purportedly pressured the Supreme Court into aligning with the presidential economic strategy. The extent to which the Court Packing efforts were decisive or influential in the Court's reversal is controversial. See Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201 (1994).

survived the demise of substantive due process in 1937.³³

In fact, as soon as 1938, the Court in *United States v. Carolene Products*³⁴ suggested that this deference to economic regulations might not extend to other non-economic substantive interests within or without the constitutional text.³⁵ Shortly thereafter, in *Skinner v. Oklahoma*³⁶ and *Prince v. Massachusetts*,³⁷ the Court continued to recognize fundamental interests in marriage, procreation, and family life along the lines drawn by *Meyer* and *Pierce*.³⁸

B. GRISWOLD'S PENUMBRAS: PRIVACY AS INDIVIDUAL DECISIONMAKING

Griswold v. Connecticut was the case that “(legally speaking) actually put the ball in motion.”³⁹ But it was *Eisenstadt v. Baird*⁴⁰ that put into perspective the right to privacy recognized therein, for it detached privacy from both the institution of marriage and the traditional nuclear family, and refocused it as an individual right.

Connecticut's Comstock-era statute⁴¹ made it a crime for any person, married

33. Paul G. Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case*, 64 MICH. L. REV. 235, 239-40 (1965). See WEISBERG & APPLETON, *supra* note 28, at 21.

34. 304 U.S. 144 (1938).

35. *See id.* at 153 n.4.

36. 316 U.S. 535 (1942). In *Skinner*, the Court scrutinized Oklahoma's Habitual Criminal Sterilization Act which, required the forced sterilization of a third-time criminal offender who committed a felony involving “moral turpitude,” like larceny, but not embezzlements. The arbitrary classification between these two criminal offenses rendered the law invalid under Equal Protection analysis, for the legislation “involve[d] one of the basic civil rights of man.” *Skinner*, 316 U.S. at 541. “Marriage and procreation,” emphasized the Court, “are fundamental to the very existence and survival of the race.” *Id.* (emphasis added).

37. 321 U.S. 158 (1944). In *Prince* the Court upheld a state prohibition on child labor as applied to a Jehovah's Witness who had her child distribute religious literature in public places. While doing so, it recognized *Meyer* and *Pierce* not merely as cases dealing with the teaching of certain languages or the protection of general educational decisions; rather, it recognized their broader meaning in terms of state intervention into certain private matters. In this sense, “these decisions have respected the private realm of family life which the state cannot enter.” *Id.* at 166 (emphasis added). *See also* Wisconsin v. Yoder, 406 U.S. 205 (1972).

38. For an interesting development of this right to procreate *see Gerber v. Hickman*, 264 F.3d 882 (9th Cir. 2001), *rev'd en banc*, *Gerber v. Hickman*, 291 F.3d 617 (9th Cir. 2002), where a federal court of appeals held that an inmate has a fundamental right under *Skinner* to procreate after being incarcerated by sending his semen through mail to a laboratory where his spouse would be impregnated. According to *Gerber*, because women and men are not biologically similarly situated, women do not have the same procreation right in the context of prison.

39. LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE 20TH CENTURY 327 (2002).

40. 405 U.S. 438 (1972).

41. The Federal Comstock Law of 1873, as amended in 1876, was named after Anthony Comstock, a self-appointed purity campaigner who lobbied in Congress for this national law that prohibited the mailing of any “obscene, lewd, or lascivious” publication, of any *thing* designed “for the prevention of conception or procuring abortion.” Act of July 12, 1876, 19 Stat. 90. *See MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA* 157-59 (1985), *excerpted in RICHARD TURKINGTON & ANITA L. ALLEN, PRIVACY LAW: CASES AND MATERIALS* 613-15 (1999). The Connecticut law was one of several statutes adopted by states during the last quarter of the 19th century, similar to the Comstock federal law. Catherine G. Roraback, *Griswold v. Connecticut: A*

or unmarried, to use any drug or medical device for the purpose of preventing conception, and prohibited the assistance or counseling of such acts.

The Court declined to interpret the content of the term *liberty* in the Due Process Clause independently, purportedly avoiding a *Lochnerian* approach.⁴² Thus emerged the penumbral rhetorical device.⁴³ The Bill of Rights, stated the Court, created an identifiable *zone of privacy* that linked privacy to several textual anchors.⁴⁴

A narrow reading of *Griswold* would reveal that the Court sought to protect a particular relationship—the traditional and familial marital bond. The Connecticut law “operate[d] directly on an *intimate relation of husband and wife* and their physician’s role in one aspect of that relation.”⁴⁵ The issue, stated the Court, concerned “*a relationship lying within* the zone of privacy created by several fundamental constitutional guarantees.”⁴⁶ This particular relationship is within a notion of privacy that is “older than the Bill of Rights.”⁴⁷ “Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.”⁴⁸ In this sense, *Griswold* holds a conservative principle, for it represents nothing more than a perpetuation of the traditional institution of

Brief Case History, 16 OHIO N.U. L. REV. 395 (1989). Connecticut’s statute had been on the books since 1879. See *Poe v. Ullman*, 367 U.S. 497, 501 (1961).

42. *Griswold v. Connecticut*, 381 U.S. 479, 481-82 (1965) (“Overtones of some arguments suggest that [Lochner] should be our guide. But we decline that invitation . . . We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.”); see Sanford Levinson, *Privacy*, in KERMIT L. HALL, ed., THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 671, 674 (1992). This move, however, did not save the Court from criticism. The penumbral approach has, no doubt, been subjected to the same critiques charged against the protection of contractual liberty during the *Lochner* period. See Kauper, *supra* note 33, at 253. (“The only point I wish to make is that in extending the specifics to the periphery, and in finding rights derived from the total scheme of the Bill of Rights, the Court is applying essentially the same process as that used in the fundamental rights approach, but dignifying it with a different name and thereby creating the illusion of greater objectivity.”).

43. “The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that give them life and substance . . . Various guarantees create zones of privacy . . .” *Griswold*, 381 U.S. at 484.

44. The specific guarantees that formed this privacy aura were the First Amendment’s penumbral association rights that *Meyer* and *Pierce* had created; the Third Amendment’s prohibition of quartering soldiers in times of peace; the Fourth Amendment’s unreasonable searches and seizure protection and the right to be secure in one’s persons, houses, papers and effects; the Fifth Amendment’s self-incrimination guarantee; and the Ninth Amendment’s provision that the enumeration of the Bill of Rights shall not be construed to limit other rights retained by the people. Cf. *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (“This “liberty” is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.”).

45. *Griswold*, 381 U.S. at 482 (emphasis added).

46. *Id.* at 485 (emphasis added).

47. *Id.* at 486.

48. *Id.*

marriage and the nuclear family that *Meyer* and *Pierce* also sought to protect.

Similarly, to the extent that *Griswold* protected only the *use of contraceptives in the home*, as a secluded activity, its protection may be narrowly read as a limited guarantee against governmental intrusion into a traditionally secluded sphere.⁴⁹

The present case . . . concerns a law which, *in forbidding the use of contraceptives rather than regulating their manufacture or sale*, seeks to achieve its goals by means having a maximum destructive impact upon that relationship . . . Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.⁵⁰

Griswold's concern for the *use* of the contraceptives inside the *sacred precincts of marital bedroom* and the concern for the surveillance into intimate affairs cannot be overstated. *Eisenstadt v. Baird* clarified some of these issues seven years later.⁵¹ In *Eisenstadt* the challenged act presented two crucially different aspects from the law in *Griswold*: It was directed at the public distribution of contraceptives and not their private use, and it only addressed unmarried couples thereby not affecting the marital institution.⁵²

By striking down the act as unconstitutional, the Court made clear that the privacy is not simply concerned with governmental physical access to a particular secluded place.⁵³ Rather, privacy is more generally about the individual's ability to make certain kinds of important *decisions*.

If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion

49. See MICHAEL SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 96 (1996). For Sandel, *Griswold* "remained tied to the traditional notion of privacy as the interest in keeping intimate affairs from public view. The violation of privacy consisted in the intrusion required to enforce the law, not in the restriction the freedom to use contraceptives." *Id.* But see TRIBE, *infra* note 55.

50. *Griswold*, 381 U.S. at 485-86 (emphasis added).

51. 405 U.S. 438 (1972).

52. The challenged law permitted the sale of contraceptives to married couples for the purpose of preventing conception but only with medical prescription. Also distribution to single persons was prohibited to prevent pregnancy; although it was permitted only to prevent disease. *Eisenstadt v. Baird*, 405 U.S. 438, 442 (1972).

53. Compare *Stanley v. Georgia*, 394 U.S. 557 (1969), where the Court held that the First Amendment prohibits making a crime the private possession of obscene material in one's home, for the right to be free from unwanted governmental intrusions into one's privacy is fundamental. However, as *Paris Adult Theatre I. v. Slaton*, 413 U.S. 49 (1973) makes clear, the right to privacy is not limited to a specific place. "The protection afforded by [Stanley], is restricted to a place, the home. In contrast, the constitutionally protected privacy of family, marriage, motherhood, procreation, and child rearing is not just concerned with a particular place, but with a protected intimate relationship. Such protected privacy extends to the doctor's office, the hospital, the hotel room, or as otherwise required to safeguard the right to intimacy involved." *Id.* at 66 n.13 (emphasis added).

into matters so fundamentally affecting a person as the *decision whether to bear or beget a child.*⁵⁴

In this sense, contraception is protected not because its enforcement would necessitate an intrusion into the home but rather because the decision whether to bear or beget a child implies a highly important, *i.e.* fundamental, intimate and personal choice.⁵⁵ As one author has stated: *Eisenstadt* “redescribe[d] the bearers of privacy rights from persons *qua* participants in the social institution of marriage to persons *qua* individuals, independent of their roles of attachment.”⁵⁶ Thus, *Eisenstadt* brought to the forefront privacy as protecting the more general right to make basic personal decisions, since these decisions represent intimate choices of a fundamental nature.⁵⁷

These cases, and the interests they protect, are at the background of *Roe v. Wade*.⁵⁸ Understanding how the *Griswold* line of cases is linked to *Roe* is essential to grasping how U.S. constitutional doctrine embodies the value of identity definition. Therefore, together with *Roe*, this jurisprudence will be the platform from which to conduct our analysis of Puerto Rico’s protection of decisionmaking privacy—that is, its connection with the concept of human dignity and the recognition of a space to define our identities by deciding who we are, and who we want to be.

C. PRIVACY AS PERSONHOOD: ABORTION, DECISIONMAKING AND IDENTITY DEFINITION

The challenged Texas statute in *Roe* made it a crime to procure or attempt an abortion except “by medical advice for the purpose of saving the life of the

54. *Eisenstadt*, 405 U.S. at 453 (emphasis added). See TRIBE, *supra* note 29, at 1339.

55. Tribe responds to Justice Douglas’s rhetorical question of whether the Court would “allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives.” *Griswold*, 381 U.S. at 485. “The answer, of course, would be yes—if contraceptives had no relationship to intimate personal choices.” TRIBE, *supra* note 29, at § 15-10, 1338.

56. SANDEL, *supra* note 49, at 97. In this sense, the Court disassociated privacy from marriage and linked it with the freedom of the *individual*, “married or single,” when it stated:

It is true that in *Griswold* the right of privacy is inherent in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two *individuals* each with a separate intellectual and emotional makeup.

Eisenstadt, 405 U.S. at 453 (emphasis added).

For an analysis of the tension between individual decisionmaking privacy and privacy as a marital-family-based right see June Aline Eichbaum, *Towards an Autonomy-Based Theory of Constitutional Privacy: Beyond the Ideology of Familial Privacy*, 14 HARV. C.R.-C.L. L. REV. 361 (1979).

57. *Eisenstadt*, 405 U.S. at 438; *Carey v. Population Servs.*, 431 U.S. 678 (1977). See TRIBE, *supra* note 29, at § 15-10, 1338, 1348. The Court could have reasoned, as Law has argued, that denying access to contraception amounts to a state-imposed burden of unwanted pregnancy. Because no man faces the risk of being pregnant, denying access to contraceptives burdens the woman in a particular manner, presenting a sex equality issue, and not necessarily one entirely focused on privacy. Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 977-78 (1984).

58. 410 U.S. 113 (1973).

mother.”⁵⁹ Similar statutes were in place at the time in the majority of the United States jurisdictions, including Puerto Rico.⁶⁰ The Court struck down the Texas statute as unconstitutional because it violated women’s right to privacy.

By focusing on privacy, however, we must not ignore that abortion laws also implicate fundamental equality values. As Sylvia Law argues, “The rhetoric of privacy, as opposed to equality, blunts our ability to focus on the fact that it is *women* who are oppressed when abortion is denied.”⁶¹ Hence, it is worth mentioning that the Court gave attention to this reality when it described women’s particular interests in abortion:

The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.⁶²

The right to abortion, however, is not absolute—stated the Court—for the state has two important interests that both become compelling as the woman comes closer to term: (1) the concern in safeguarding the health of the pregnant woman—the compelling point being the end of the first trimester;⁶³ and (2) the state interest in protecting the potential life—the compelling point being viability.⁶⁴ Thus, the Court formulated the famous, but now abandoned, trimester approach.

59. *Id.* at 117-18.

60. *Id.* at 118 n. 2. In Puerto Rico, see *Montalvo v. Hernández*, 377 F. Supp. 1333 (D. P.R. 1974).

61. Law, *supra* note 57 at 1020.

62. *Roe v. Wade*, 410 U.S. 113, 154 (1973).

63. With regard to the moment in which the interest in safeguarding the health of the pregnant woman becomes compelling, the Court found that “in light of present medical knowledge,” that moment is approximately at the *end of the first trimester* because until that point mortality rates for women undergoing abortion is as low or lower than mortality rates in normal childbirth. *Id.* at 163. From the moment of conception and during the first trimester of pregnancy, the decision whether to terminate the pregnancy must be left to the woman with her physician without state regulation; but after that first trimester (throughout the second trimester) the state’s interest is heightened, and thus the state is able to regulate abortion only to the extent to which the regulation is reasonably related to the preservation and protection of maternal health. *Id.*

64. In determining at what point the other state interest in protecting the *potential life* becomes pressing, the Court rejected the argument that life begins at conception, and thus that the state interest in the protection of the potential life is triggered at that moment. In addition, the Court declined to make a decision on that regard. “We need not resolve the difficult question of when life begins . . . When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any

One common criticism of this decision has to do with the Court's legitimacy in intervening in such a divisive issue.⁶⁵ On John Hart Ely's view, *Roe* is simply bad constitutional law because it decided an issue that "the Constitution has not made the Court's business."⁶⁶

But if, as these critics argue, the judiciary cannot strike the balance made by the Court in *Roe*, then on whose shoulders should the decision rest? In other words, who is entitled to choose between the competing interests at stake in the decision whether to terminate the pregnancy: the government (even if politically accountable) or women? As Professor Tribe has argued, the Court in *Roe* did not make a choice between abortion, on one hand, and pregnancy, on the other.

consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." *Id.* at 159.

Instead, it selected the moment at which the fetus is *viable* as the point in which this important state interest becomes compelling, and therefore dominant over the woman's privacy concerns. After this point (from about the end of the second trimester until birth, *Roe*, 410 U.S. at 160 ("Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks")), the state is permitted to place any limitation upon abortion, including its proscription. However, the state must provide for an exception where abortion is necessary to preserve the life or health of the mother. "This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications." *Id.* at 163.

Richard Epstein has argued that a decision regarding whether the fetus is a person was inevitable, and thus the Court should have confronted it. Since, in his opinion, the right to privacy is not really implicated in the abortion decision (because he argues that abortion has no relation to either *Griswold* or *Eisenstadt*), the question then turns into an issue about classical liberalism in the tradition of John Stuart Mill's self-regarding acts. That is, the question becomes one about the limits of the government vis-à-vis individual freedom: *i.e.*, that the government is entitled to restrict individual freedom only to the extent that it is necessary to protect other persons from harm. Framing the question in this way, the issue is whether there is a harm to a third person, which brings to the forefront the issue whether the unborn is a person that cannot be harmed. Richard A. Epstein, *Substantive Due Process by Another Name: The Abortion Cases*, 1973 SUP. CT. REV. 159, 170.

In this sense, the privacy rhetoric in *Roe* was merely a device to mask and avoid the real decision about the personhood of the unborn. *Id.* at 175. This unavoidable decision, argues Epstein, is best made by the politically accountable bodies (*i.e.* state legislatures) for they at least can rest the choice made on popular will. *Id.* at 175, 185. But as Tribe has argued, since there is no settled or consensual position regarding when life begins, and only different religions have been able to select different positions according to their faiths, any decision arrived at by state legislatures on this regard would be an impermissible entanglement with religion violating the Establishment Clause. Laurence Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 18-25 (1973).

65. Epstein, *supra* note 64, at 168 ("The diversity of opinions on all aspects of the abortion question might have suggested that the Court should have been careful not to foreclose debate on the issue by judicial decision, and more careful still not to use constitutional means to resolve the question."). See also *Roe*, 410 U.S. at 174 (Rehnquist, J., dissenting).

66. John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L. J. 920, 934-36 (1973). For Ely the right claimed in *Roe* has no relation to the right to *privacy*, nor is it inferable from any of the protected values in the Constitution. Nor is there a discrete and insular minority to be protected or a politically impotent group in relation to the interests put forth by the state. "Compared with men, women may constitute such a 'minority'; compared with the unborn, they do not." *Id.* at 934-36. In a broader sense, for Ely, "judicial review . . . can appropriately concern itself only with questions of participation, and not with the substantive merits of the political choice under attack." JOHN HART ELY, *DEMOCRACY AND DISTRUST* 181 (1980).

It was instead choosing among alternative allocations of decisionmaking authority, for the issue it faced was whether the woman and her doctor, rather than an agency of government, should have the authority to make the abortion decision at various stages of pregnancy.⁶⁷

In this view, the Court did not make a decision outside “its business”; for it only decided who, other than the Court, is better suited to make choices *of that sort*.⁶⁸ And in light of previously recognized constitutional values under the rubric of privacy—*i.e.* rights against state interference into family self-definition and reproductive autonomy—it is the woman alone, not the state, who is authorized to make such a decision.⁶⁹ After all, being *compelled* to endure childbirth and child rearing is a form of physical and psychological violence imposed solely on

67. Tribe, *supra* note 64, at 11.

68. *Id.* This approach has also been followed by Justice Stevens in *Thornburg v. Am. Coll. of Obstetricians*, 476 U.S. 747, 772 (1986). In a concurring opinion he argued that “no individual should be compelled to surrender the freedom to make that decision for herself simply because her ‘value preferences’ are not shared by the majority. In a sense, the basic question is whether the ‘abortion decision’ should be made by the individual or by the majority in the unrestrained imposition of its own, extraconstitutional value preferences.” *Id.* at 777-78 (Stevens, J., concurring) (emphasis added).

One objection to this approach would be that it is illusory or naïve to assume that the Court could really avoid taking sides on the moral and religious issues that abortion entails by merely assuming a “neutral” position and allocating the decisionmaking authority elsewhere. SANDEL, *supra* note 49, at 21. In this sense, because there are underlying contesting moral positions regarding when human life begins, a decision favoring one litigant over the other would imply the rejection of the losing party’s moral position. Thus, “[t]he case for respecting a woman’s right to decide for herself whether to have an abortion depends on showing that there is a relevant moral difference between aborting a fetus at a relatively early stage of development and killing a child.” *Id.* But this critique hardly contests Tribe’s argument. To be sure, the Court did engage in a substantive decision of values, but it was value-laden in a different respect. Using the language of privacy it made a choice favoring the woman, not the state or the community, as the person ultimately affected by carrying the pregnancy to term and recognized “the moral harm of denying women choice, due to the deeply personal nature of the pain and suffering of pregnancy, childbirth and motherhood.” James E. Flemming and Linda C. McClain, *The Right to Privacy in Sandel’s Procedural Republic*, in ANITA L. ALLEN & MILTON C. REGAN, JR., EDs., DEBATING DEMOCRACY’S DISCONTENT: ESSAYS ON AMERICAN POLITICS, LAW, AND PUBLIC PHILOSOPHY 249, 254 (1998) (the authors refer in this passage to *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), but it is equally applicable to women’s interests as referred to in *Roe*).

In Tribe’s words, it is not that the Court avoided making any choice on values; rather, the interests the Court balanced in *Roe* “are those, and only those, which bear directly on the merits of the alternative allocation of roles. It thus avoids balancing interests in a manner that goes only to the merits of exercising various roles in particular ways—the values associated with specific outcomes viewed in relative isolation, assessed from the perspective of existing groups with already defined roles and interests. Insofar as the values connected with one or another outcome bear on the role-allocation problem itself, those values must of course be considered.” Tribe, *supra* note 64, at 50-51.

69. Tribe, *supra* note 64, at 34-41; see also Law, *supra* note 57 (recognizing the biological difference between men and women (namely, that women possess the capacity to reproduce the species), and the insufficient protection that assimilationist visions of sex equality confer). Professor Law proposes an approach that takes into account such differences when evaluating laws that regulate reproductive biology. She proposes that such laws be presumed unconstitutional and that they be “scrutinized by courts to ensure that (1) the law has no significant impact in perpetuating the oppression of women or culturally imposed sex-role constraints on individual freedom or (2) if the law has this impact, it is justified as the best means of serving a compelling state interest” *Id.* at 1008-09. For another perspective of *Roe* and

women.⁷⁰ Or as Rubenfeld cogently stated, following an anti-totalitarian principle, anti-abortion laws commandeer, direct and take hold of women's lives into a particular life-plan: *motherhood*.

[F]orced motherhood shapes women's occupations and preoccupations in the minutest detail; it creates a perceived identity for women and confines them to it; and it gathers up a multiplicity of approaches to the problem of being a woman and reduces them all to the single norm of motherhood.⁷¹

Particularly in Latin American societies like Puerto Rico where motherhood is a deeply embedded institution, reproductive freedom is necessary. It allows women to think about motherhood as an option rather than as a culturally predetermined way of life.⁷²

If we frame the issue this way, that is, allocation of decisionmaking authority, it begs the question: What kind of decisions must be allocated to individuals and taken away from the government's agenda?

At one level, the accommodation of *Roe* into the privacy label, framed in decisional terms, had been facilitated by *Griswold* and *Eisenstadt*.⁷³ These cases, *Eisenstadt* in particular, transcended the traditional and narrow notions of privacy as a protection from intrusions into physical spaces and emphasized the individual's ability to make unfettered *decisions* about certain matters. At another level, and more importantly, *Eisenstadt* anticipated the *kind* of decisions deemed fundamental enough to afford constitutional protection for abortion. Contraception was based on a value spacious enough to fit the interest claimed in *Roe*—"the decision whether to bear or beget a child."⁷⁴

Some have argued that the only valid conception of the right to privacy relates to control over personal information, seclusion, restricted access, search and seizure protections, and similar notions. These positions assume that what is really at stake in the decisionmaking cases are general notions of autonomy,

sex-equality *see* Ruth Bader Ginsburg, *Some Thought on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985).

70. *Id.*; *see* 1 TRIBE, *supra* note 20, at 1339; TRIBE, ABORTION: THE CLASH OF ABSOLUTES 100, 103-104 (1992).

71. Rubenfeld, *supra* note 27, at 788.

72. ALICE COLÓN, ANA LUISA DÁVILA, MARÍA DOLORES FERNÓS, ESTHER VICENTE, POLÍTICAS, VISIONES Y VOCES EN TORNO AL ABORTO EN PUERTO RICO 12-24 (1999).

73. *See* Richard A. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173. "Once the Court, in *Baird*, had severed the right to use contraceptives from any concept of privacy as what people do in private, it was perhaps inevitable that the right of privacy would eventually be held to imply the right of a married or unmarried woman to have an abortion. Abortion is an alternative method of contraception." *Id.* at 198.

74. *Id.* (emphasis added); *see* 1 TRIBE, *supra* note 20, at 1339; *see also* WEISBERG & APPLETON, *supra* note 28, at 37 n. 3.

freedom, and liberty.⁷⁵ But efforts to erase the privacy rubric from these decisions are completely missing the point as to why *those* decisions are protected from State intrusion in the first place: They are protected as fundamental private decisions because they are *highly personal, intimate and truly private choices having to do with the ability to form our identities both individually and through the relationships we form with others*. They are fundamental decisions not only because they embody autonomous choices, but because those choices are self-definitional.

Wagner DeCew, a leading privacy theorist, has argued that although these two notions of privacy may at one level represent distinct ideas, these concepts (classic privacy and autonomy) often overlap, and it is at their intersection that the decisionmaking privacy emerges as a privacy-related protection.

75. Dissenting in *Roe*, Justice Rehnquist expressed difficulty in concluding that *privacy* was really involved in the case, for the operation involved in abortion was not “‘private’ in the ordinary usage of that word, nor search and seizure privacy had anything to do with the issue.” *Roe v. Wade*, 410 U.S. 113, 172 (1973) (Rehnquist, J. dissenting). If anything, it was the *liberty* in the Fourteenth Amendment that had to be invoked by the Court and, being a non-fundamental liberty, it ought to be subjected to the minimum judicial scrutiny applicable to social and economic legislation under the due process clause. *Id.* (citing *Williamson v. Lee Optical Co.*, 348 U.S. 483, 491 (1955)). At a first glance, this criticism about the use of the term *privacy* seems true. There are differences between, on one hand, the notion of privacy conceived as restricted access to one’s information, mental state, non-surveillance, seclusion and solitude; and, on the other, its usage referring to autonomy and freedom from governmental interference when engaging in certain decisions, *i.e.* the right to be let alone, which seems to derive from the liberal public/private distinction. ANITA L. ALLEN, *UNEASY ACCESS, PRIVACY FOR WOMEN IN A FREE SOCIETY* 99 (1988) [hereinafter, *UNEASY ACCESS*]; Anita L. Allen, *Taking Liberties: Privacy, Private Choice, and Social Contract Theory*, 56 U. CIN. L. REV. 461, 463-66 (1987); cf. Jean L. Cohen, *Redescribing Privacy: Identity, Difference, and the Abortion Controversy*, 3 COL. J. GENDER & L. 43, 92 (1992); Christine Synnott, *The Civility of Law: Between Public and Private*, in MAURIZIO PASSERIN D’ENTRÈVES & URSULA VOGEL, EDs., *PUBLIC & PRIVATE: LEGAL, POLITICAL AND PHILOSOPHICAL PERSPECTIVES* 93 (2000).

Many authors have endorsed this narrow view, which envisions any legitimate claim of “true privacy” as sharply separated from the decisionmaking aspects of privacy so far described; they contend that autonomy or liberty is really at stake in these cases. Ely, *supra* note 66, at 930-31 (Ely believes that one of the reasons that *Roe* is illegitimate is that *privacy* has nothing to do with abortion because it “is not about governmental snooping”); Posner, *supra* note 73; Hyman Gross, *Privacy and Autonomy*, in J. ROLAND PENNOCK & JOHN CHAPMAN, *NOMOS XIII: PRIVACY* 168, 180-82 (1971) [hereinafter *NOMOS XIII*]; William A. Parent, *Privacy, Morality, and the Law*, 12 PHIL. & PUB. AFFAIRS. 269 (1983); Epstein, *supra* note 64, at 170; Raymond Wacks, *The Poverty of Privacy*, excerpted in, TURKINGTON & ALLEN, *supra* note 41, at 611-12. Choosing privacy as the preferred label in the decisionmaking cases, it is said, was a mere historical contingency; a by-product of the bad reputation of Lochnerizing. See Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L. J. 421 (1980), reprinted in FERDINAND DAVID SCHOEMAN, *PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY* 358 (1984) (hereinafter, *PHILOSOPHICAL DIMENSIONS OF PRIVACY*); Sanford Levinson, *supra* note 42. Today, *liberty* instead of privacy has gained preeminence in issues like abortion, the so-called right to die cases and more recently in *Lawrence v. Texas*, 539 U.S. 558 (2003). *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Cruzan v. Director*, 497 U.S. 261 (1990); *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Vacco v. Quill*, 521 U.S. 793 (1997). *Lawrence*’s teaching regarding the use of labels is, thus, revealing; the political-constitutional values at stake are more important than labels.

Many privacy issues, such as protection from unwarranted electronic surveillance, will have nothing to do with autonomous decision-making. Conversely, many self-determined choices—to drive a car stereo blaring through a quiet neighborhood, for example—can be made by an individual but will not in any further sense be private decisions; thus, privacy is not involved. However, a subset of autonomous decisions, certain personal decisions regarding one's basic lifestyle, can be said to involve privacy interests. They should be viewed as autonomy cases in virtue of their concern with individual, as opposed to state decision-making *power*; and privacy is at stake because of the *nature* of the decision is crucial to one's "inviolate personality" or bodily integrity.⁷⁶

Wagner DeCew emphasizes that the subject-matter of those choices, and not the choice itself, is what makes the protected interests in this decision-making jurisprudence properly *private*. To the extent that they are "*personal decisions regarding one's basic lifestyle that help define one's self-identity, [they] can plausibly be said to involve privacy interests as well.*"⁷⁷

Clearly the Court has emphasized something other than mere autonomy when individuals make these protected decisions. This other emphasis is what the Supreme Court of the United States has been protecting under the privacy rubric (at least until *Casey* and *Lawrence*), and what the broader conception of privacy in Puerto Rico should vigorously recognize, *i.e.*, *privacy as personhood; or privacy conceived as the ability to develop one's personality and identity*. That is, the Madman's plight.

As Cohen puts it:

Much more is involved here than the right to be let alone. What is at stake is the protection of concrete, fragile identities, and self-creative processes which constitute who we are *and* who we wish to be. When properly understood, privacy rights protect these as well as the chance for each individual to develop, revise, and pursue her own conception of the good—her identity needs.⁷⁸

76. JUDITH WAGNER DECEW, IN PURSUIT OF PRIVACY: LAW ETHICS AND THE RISE OF TECHNOLOGY 41 (1997).

77. *Id.* at 44 (emphasis added); see also JULIE C. INNESS, PRIVACY, INTIMACY, AND ISOLATION (1992). Regarding intimacy, Julie Inness argues that:

The Court's treatment of privacy cases clearly drives a wedge between the moral value of liberty as a whole and that of privacy. As far as constitutional privacy is concerned, we value privacy-protected liberty because it allows us both literal and figurative room for intimacy; however, clearly we do not value all forms of liberty from state regulation due to reasons of intimacy. *Thus, we can distinguish between the value accorded to constitutional privacy and that accorded to liberty from undue state interference.*

Id. at 124.

78. Cohen, *supra* note 75, at 101.

Similarly, Linda McClain identifies in this constitutional landscape that privacy “has stood not for isolation of the right holder for its own sake, but for the critical importance of a space for decision making and the *constitutive nature of such decision making.*”⁷⁹

Recently, the United States Supreme Court crystallized this aspect in *Lawrence v. Texas*⁸⁰ when it reiterated *Casey’s* expressions emphasizing identity-formation as a fundamental value:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. *At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.*⁸¹

In sum, “the Court has conceptualized the protection of privacy as the state’s noninterference in certain decisions that are essential to defining personhood.”⁸² Thus, the protection afforded to the kind of personal decisions made in these cases since *Meyer* and *Prince*, underscores the centrality of a sphere for giving shape to our identities, individually or in our relationship with others. Within this realm we can make decisions about procreation, contraception, the education and upbringing of our children, and marital and non-marital intimacy, as it is through these activities that we define ourselves in the many ways we can.⁸³ In Cohen’s words:

Privacy rights do not prescribe what identities should be like, rather, they secure to all individuals the preconditions for developing intact identities which they embrace as their own . . . [T]hey protect the processes of self-development and self realization that allow each individual to define herself. The principle that articulates this idea in American privacy doctrine is, of course, the principle of *inviolable personality.*⁸⁴

Other commentators have endorsed the identity-shaping function of these rights. For philosopher Stanley Benn, the right to privacy prominently includes

79. Linda M. McClain, *The Poverty of Privacy?*, 3 COLUM. J. GENDER & L. 119, 129 (1992) (emphasis added).

80. 539 U.S. 558, 574 (2003).

81. Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992) (emphasis added).

82. Daniel Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087, 1117 (2002).

83. In the context of abortion, for example, the woman’s decision is brought into focus as self-definitional because “[t]he destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.” *Casey*, 505 U.S. at 852.

84. Cohen, *supra* note 75, at 101-02.

the notion that respect must be given to our choices as *persons*.

[A] general principle of privacy might be grounded on the more general principle of respect for persons . . . To conceive someone as a *person* is to see him as actually or potentially a chooser, as one attempting to steer his own course through the world, adjusting his behavior as his perception of the world changes, and correcting course as he perceives his errors. It is to understand that his life is for him a kind of enterprise like one's own, not merely a succession of more or less fortunate happenings, but a record of achievements and failures; and just as one cannot describe one's own life in these terms without claiming that what happens is important, so to see another's in the same light is to see that for him at least this must be important.⁸⁵

Tribe, for instance, explained that the Court sought to protect "those attributes of an individual which are irreducible in his selfhood."⁸⁶ "The very idea of a fundamental right of personhood rests on the conviction that, even though one's identity is constantly and profoundly shaped by . . . one's social environment, the 'personhood' resulting from this process is sufficiently 'one's own' to be deemed fundamental in confrontation with the one entity that retains a monopoly over legitimate violence—the government."⁸⁷

Of course, to emphasize these opportunities for self-definition does not assume identities as essential, determined and predictable. This would be "inconsistent with a decentered, polymorphous, contingent understanding of the subject."⁸⁸ Self-definition implies our ability to constitute, reconstitute and constantly revise our understanding of who we are at every stage of our lives.

Furthermore, identity categories may be assumed not as essential and timeless attributes of our selves, but as historically contingent protean tools that can be used to articulate legal and political claims.⁸⁹ Such is the case, for example, of the constructed homosexual identity. As a legal and social category it sometimes inscribed with connotations that facilitate the exercise of violence and power against individuals within it (as the case of adoption rights denial to same-sex partners). But this category can also be appropriated, reconstituted and politically used to claim a dignified legal status in society (as the current struggle for the legal recognition of same-sex marriage shows).

85. Stanley I. Ben, *Privacy, Freedom, and Respect for Persons*, in *PHILOSOPHICAL DIMENSIONS*, *supra* note 75, at 223, 228-29.

86. TRIBE, *supra* note 29, at § 15-1, 1304.

87. *Id.* at § 15-2, 1305-06.

88. Mary Joe Frug, *A Postmodern Feminist Manifesto (An Unfinished Draft)*, in DAN DANIELSEN & KAREN ENGLE EDs., *AFTER IDENTITY: A READER IN LAW AND CULTURE* 9 (1995).

89. Kendall Thomas, *The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick*, 79 VA. L REV. 1805, 1831 (1993).

D. PRIVACY AS A MULTIDIMENSIONAL CONCEPT

Even considering identity definition as an important constitutional value that supports privacy claims, privacy is not a one-dimensional right. It is a broader concept that includes different correlated political and constitutional values. Thus, as explained by Wagner DeCew, we must reject the simple division between informational and decisionmaking privacy and other simplifying efforts. At the same time we must also reject efforts to build an encompassing theory of the right that would cabin it within one sole notion.⁹⁰ For, as Tribe put it, “A concept in danger of embracing everything is a concept in danger of conveying nothing.”⁹¹

Instead, privacy is “a cluster concept covering multiple privacy interests, including those enhancing control over information and our need for independence as well as those enhancing our ability to be self-expressive and to form social relationships.”⁹² As Daniel Solove states, “A pragmatic approach to the task of conceptualizing privacy should not, therefore, begin by seeking to illuminate an abstract conception of privacy, but should focus instead on understanding privacy in specific contextual situations”⁹³ This means that we should approach privacy with our minds open to its many dimensions.

Turning away from attempts to define privacy in the abstract does not mean abandoning the quest to conceptualize privacy. To the contrary, a legal or policy analysis of a privacy problem without attempting to understand what privacy is represents a failure to define the problem adequately. Understanding the nature of a problem, what is at stake, and what important values are in conflict is necessary to guide the crafting of a solution.⁹⁴

This view is both broad and inclusive, and shifts our focus from the labels towards the content of the protected interests.⁹⁵ One such interest—one of the most important for the Constitution and the focus of this Article—is self-definition.⁹⁶ To see this richer multi-dimensional aspect of privacy we must

90. WAGNER DECEW, *supra* note 76, at 73.

91. *Id.*

92. *Id.*

93. Solove, *supra* note 82, at 1128.

94. *Id. See also* Daniel Solove, *A Taxonomy of Privacy*, 154 U. PENN. L. REV. 477 (2006). For a similar view see Helen Nissenbaum, *Privacy as Contextual Integrity*, 79 WASH. L. REV. 119 (2004). Nissenbaum contends that, instead of a certain practice being pro- or anti-privacy a priori, one can only make such evaluation according to the different contexts in which privacy claims take place. Hence, privacy claims follow a kind of “contextual integrity.” *See id.* at 138 (“in any given situation, a complaint that privacy has been violated is sound in the event that . . . informational norms [that are appropriate to any given context have] been transgressed”).

95. WAGNER DECEW, *supra* note 76, at 73.

96. From Wagner DeCew’s perspective, privacy consists of “three related clusters of claims concerning [1] information about oneself, [2] physical access to oneself, [3] and decision making activity

consider this right's relation to other constitutional values that coexist and interact with identity-definition interests, such as freedom of expression, intimate associations, democracy and anonymity. In the following two subsections I will briefly address privacy's polymorphous character and the relation between the diverse political values it encases. This is done for two main reasons: First, it is important to adequately locate identity-definition interests within the broader ecology of political values associated to privacy in order to see their points of intersection. Comprehending their relation, in turn, enriches our understanding of identity-definition as an important constitutional principle. Second, to the extent that, as stated in the Introduction,⁹⁷ coexisting privacy spheres populate the legal field, courts should avoid all-encompassing theories that fail to take into account the differences between these privacy contexts. This reflection, consequently, narrows the scope of this Article and frames the ensuing recommendations and conclusions.⁹⁸

1. The Relationship Between Self-Definition, Expression and Intimate Associations

If one thinks about this self-definitional process not of isolated individuals but also concerning the way we shape our personality in relationship to others, an important intersection between free speech and privacy flourishes. That is, when one assumes identity-formation values as important principles for the social projection of our self-definitional process, then an outward/expressive dimension of privacy emerges.

Professor Field, reflecting on the intersection between the right to choose abortion and the First Amendment, has approached the subject in similar terms:

One avenue of argument is that the First Amendment protects individual choice of a wide range of life-styles; it favors individual decisionmaking, particularly “expressive” decisionmaking, over government orthodoxy. Along with rights to make reproductive choices, such a First Amendment right encompasses choices about how to live, how to look, what to wear, whom to live with, *how to develop one's personality*. At the heart of such a First Amendment “right to choose” is rejection of government orthodoxy concerning questions on which people deeply and sincerely differ from each other—a concern also central to other, more mainstream, First Amendment issues. Today such constitutional rights, when found protected, rely most frequently on the Fourteenth Amendment Due Process Clause. The right to choose found there is often described either as the “right of privacy” or the “right to liberty.” But a First Amendment foundation could be recognized as

that provide one with the independence needed to carve out one's self identity through self-expression and interpersonal relationships.” *Id.* at 78.

97. See text accompanying *supra* notes 9-17 (“Note on Scope”).

98. See *infra* Part II(C).

well. That foundation would rest upon the speech clauses of the First Amendment and would protect reproductive choice as part of *the right to choose how to be or the right to develop one's own personality.*⁹⁹

Thus, this conception of privacy as a space of self-definition and personhood has an expressive dimension that embraces free speech values as it permits the expression of the identities we have formed: The ability to define how to live our lives, and define our identities, through fundamental decisions (such as whether to bear a child, love another human being regardless of sex or race, and so forth), is closely related to our ability to decide how and to what extent we project ourselves to others. *Deciding* who you are is as important a constitutional value as *controlling* how others perceive and read your projected identity. Both are essential to the formation of the self in society. At this point, decisionmaking and information privacy connect: Identity formation depends both on our ability to make certain fundamental decisions *and* on the ability to control how others perceive us in society.

On another more intimate level, this ability to control how to define and project our identities facilitates the formation of meaningful relationships and intimate associations. Indeed, “rights of privacy can be understood as contexts for intimacy and sharing rather than as charters of isolation.”¹⁰⁰ In this sense, there is an “outward dimension of personality”¹⁰¹ that decisionmaking privacy must also take into consideration, which includes the ability to express those identities we choose and to share them with others by entering into and giving shape to intimate associations.¹⁰² That is, through our associations with others we engage in definitional processes; thus, the ability to maintain meaningful relationships is equally important.¹⁰³ Privacy accounts focusing only on “the right to be let alone” do not appreciate this dimension.

Ferdinand Schoeman, one of the most important privacy scholars in recent times, has made a crucial effort recognize privacy’s associational character.¹⁰⁴ For Schoeman, privacy is a control mechanism used by individuals as a shield

99. Martha A. Field, *Abortion and the First Amendment*, Symposium: *Developments in Free Speech Doctrine: Charting the Nexus Between Speech and Religion, Abortion, and Equality*, 29 U.C. DAVIS L. REV. 545, 550 (1996) (emphasis added).

As this passage suggests, the flip side of this self-definitional dimension of privacy is the right not to have an identity imposed onto one. Cohen, *supra* note 75, at 101. See *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943); *Woolley v. Maynard*, 430 U.S. 705 (1977). In this sense, personhood theses are related to Jed Rubenfeld’s anti-totalitarian principle. See Rubenfeld, *supra* note 27.

100. Tribe, *supra* note 64, at 34.

101. TRIBE, *supra* note 29, at § 15-1, 1303-04.

102. See Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L. J. 624, 635-36 (1980) (“Whether one’s intimate associations be affirming or destructive or both, they have a great deal to do with the formation and shaping of an individual’s sense of his own identity. It is an individual’s intimate associations that give him his best chance to be seen (and thus to see himself) as a whole person rather than an aggregate of social roles.”).

103. *See id.*

104. FERDINAND DAVID SCHOEMAN, *PRIVACY AND SOCIAL FREEDOM* (1992).

from overreaching social control, and which is used to gauge others' influence over one's identity and, in turn, to foster and shape the character of the meaningful relationships in which one is engaged. This view highlights the expressive aspects of the right to privacy, for the exercise of individual control is aimed, not at seclusion, but at designing and fostering deep personal relationships with others.

The point of the restrictions on access is in large part not to isolate people but to enable them to relate intimately or in looser associations that serve personal and group goals. Characteristically privacy is engaged as a social category not just to preclude a wider influence but to enshroud with respect an association of people that is meaningful in its own terms.¹⁰⁵

The United States Supreme Court strongly endorsed this associational right in *Roberts v. United States Jaycees*¹⁰⁶ when it recognized *freedom of association* as a constitutional protection that gives "*the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State.*"¹⁰⁷ Protecting these intimate associations, stated the Court, is essential to the development of personality and identity:

[T]he constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. *Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty.*¹⁰⁸

From this perspective, abortion and use of contraception are better characterized within the schema of privacy than autonomy, for autonomy highlights anti-associational aspects while those activities are actually highly associational. As Schoeman states, "Rights to birth control and abortion are aspects of relating to another intimately, and not characteristically a means of alienating oneself from all others."¹⁰⁹ This notion of privacy as the control of others' influences through our associational relations is important for social freedom, for "[w]e exercise our freedom not by our indifference to others' goals and attitudes, but by belonging and participating in various associations. By and large, we express ourselves as effective agents of social change through such

105. *Id.* at 21. *See also id.* at 89-114.

106. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

107. *Id.* at 618 (emphasis added).

108. *Id.* at 619.

109. SCHOEMAN, *supra* note 104, at 156.

associations.”¹¹⁰

2. Privacy’s Relation to Democracy: Freedom of Association and Anonymity

The intersection of privacy, freedom of association, and anonymity offers insight regarding democracy’s valuation of privacy. This relation is especially important in the context of identity definition, not through decisionmaking, but through the control of personal information (*i.e.*, information privacy).

To the extent that intimate associations let us exclude the government from our private discussions and personal deliberation of our points of view, democracy itself is fostered. If a democratic society needs a vigorous deliberative process, privacy is a precondition to democracy inasmuch as it gives us the space to consider issues and form our opinions before communicating them to others. In this sense, the power to control what others know about us (to control the disclosure of what we think, our ideas and values) enables us to engage in intimate associations only with people we choose to share our concerns without the fear of government reprisal or peer ostracism.¹¹¹ As Charles D. Raab has pointed out:

Participatory democracy emphasizes the capacity to act politically through freedom of choice, including free elections. “There cannot be freedom of choice in the absence of freedom of speech, organisation and assembly.” The crucial point is that these participatory freedoms require a degree of privacy for their exercise; this is pointed up by the association of free elections with the institution of secret ballot, which promotes the making of uncoerced political choices.¹¹²

Thus, the freedom to associate with others *in private* is an essential component of deliberative democracy. As stated by the United States Supreme Court, “[E]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group associations.”¹¹³ The freedom to associate in private lets us share our thoughts and deliberate with others even when we are insecure about our positions or afraid of harsh reactions.

For similar reasons, *anonymity* in public places is essential for democracy. For Alan Westin, anonymity

occurs when the individual is in public places or performing public acts but still seeks, and finds, freedom from identification and surveil-

110. *Id* at 153.

111. Charles D. Raab, *Privacy, democracy, information*, in BRIAN D. LOADER, ED., THE GOVERNANCE OF CYBERSPACE 155 (1997).

112. *Id.* at 159-60.

113. NAACP v. Alabama, 357 U.S. 449, 460 (1958).

lance . . . Knowledge or fear that one is under systematic observation in public places destroys the sense of relaxation and freedom that men seek in open spaces and public arenas.¹¹⁴

The United States Supreme Court has agreed.¹¹⁵ Especially in times of ubiquitous surveillance such as these, one must not forget that privacy is not only about the secrecy of information but, more broadly, about controlling the way we define our identities. Therefore, the right to remain anonymous in public spaces is a way to control how we project our identities to others (more precisely, to control if we project our identities). When law and technology limit our ability to control the projection of our identities in public, lack of anonymity may produce chilling effects detrimental to the richness and diversity of public discourse. Democracy may be thus threatened.¹¹⁶

To be sure, to say that information privacy concerns are especially tied to democratic interests does not reject democracy's relation to identity-definition through decisionmaking. On the contrary, as Robert Post has argued, the "Constitution protect[s] the autonomy of citizens to define their own identities in a manner that would allow them to remain sufficiently independent from the state as to preserve the legitimacy of democratic consent."¹¹⁷ In this sense,

[t]o the extent that consent flows from identity, and to the extent that identity is constructed by the state, the state cannot claim democratic legitimacy. But because the state shapes the identity of citizens in so many ways, the locus of identity that must remain independent of state regulation must be conceptualized as a moral construction that evolves in time as cultural conceptions of the self change.¹¹⁸

Although this Article highlights identity-definition as a fundamental value, we must not forget privacy's multidimensional character and its relation to other important values such as expression, association, anonymity, and

114. ALAN WESTIN, *PRIVACY AND FREEDOM* 31 (1970).

115. *Talley v. California*, 362 U.S. 60, 64-65 (1960); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995); *Watchtower Bible v. Village of Stratton*, 536 U.S. 150, 166-67 (2002).

116. This is also the conclusion of the European Court of Human Rights as it interprets Article 8 of the European Convention on Human Rights: "A person who walks down the street will, inevitably, be visible to any member of the public who is also present. Monitoring by technological means of the same public scene . . . is of similar character. Private life considerations may arise however once any systematic or permanent record comes into existence of such material from the public domain. It is for this reason that files gathered by security services on a particular individual fall within the scope of Article 8 even where the information has not been gathered by any intrusive or covert method." P.G. & J.H. v. United Kingdom, Application No. 44787/98, Eur. Ct. H.R. (2001), excerpted at SOLOVE, ROTENBERG & SCHWARTZ, *supra* note 15, at 882-85.

117. Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts and the Law*, 117 HARV. L. REV. 4, 89 (2003).

118. *Id.* at 89 n.411.

democracy.¹¹⁹

II. A PRINCIPLED APPROACH FOR PUERTO RICO

Although abortion was illegal in Puerto Rico at the time *Roe* was decided, it was a common practice and enforcement of the prohibition extremely rare.¹²⁰ In the 1960s, for instance, Puerto Rico was an abortion haven for women who traveled from the United States escaping the prohibitory laws in the majority of states.¹²¹ Since the 1930s, the Puerto Rican and United States governments strongly sponsored, and to an extent coerced, sterilization of women in the Island.¹²² The Great Depression and later the turn to an industrialized society were used to justify an aggressive population control program.¹²³ The “operation,” as it was commonly known,¹²⁴ was accompanied by efforts to foment emigration to the United States in the 1940s and 50s,¹²⁵ and also by a convenient unofficial policy of acquiescing to the establishment of illegal abortion clinics with winks and nods.¹²⁶

119. For an application of privacy’s multi-dimensionality to the information privacy context see Meléndez-Juarbe, *supra* note 17 (assessing the impact of public surveillance mechanisms on identity-definition as it relates to democratic interests).

120. COLÓN ET AL., *supra* note 72, at 80. In the twenty-year period from 1950 to 1970, less than a dozen midwives had been prosecuted (mainly for second degree murder when the abortion resulted in the death of the woman) and only one doctor was prosecuted. *Id.* at 80.

121. *Id.* at 79. In fact, in 1967 an organization of members of the clergy was created (the Clergy Consultation Service on Abortion) which referred women to safe abortion facilities and legitimate doctors in, among other places, Puerto Rico. TRIBE, *supra* note 70, at 40.

122. COLÓN ET AL., *supra* note 72, at 50-51; FRANCISCO A. SCARANO, PUERTO RICO: CINCO SIGLOS DE HISTORIA 754, 784-85 (1993). For a general view of sterilization in Puerto Rico, see CATHARINE A. MACKINNON, SEX EQUALITY 1255 (2001) and sources therein cited. By the middle of the 1980s more than a third of Puerto Rican women of child-bearing age were sterilized. *Id.* See also Harriet Presser, *Puerto Rico: Recent Trends in Fertility and Sterilization*, 12-2 FAMILY PLANNING PERSPECTIVES, 102 (Mar.-Apr. 1980); Warren, Westoff, Herold, Rochat & Smith, *Contraceptive Sterilization in Puerto Rico*, 23-3 DEMOGRAPHY 351 (August 1986). The longstanding and brutal female sterilization experience in Puerto Rico is an intricate part of the Island’s twentieth century colonial history. See Bonnie Mass, *Puerto Rico: A Case Study of Population Control*, 4-4 LATIN AMERICAN PERSPECTIVES 66 (Autumn 1977); Michael Lapp, *The Rise and Fall of Puerto Rico as a Social Laboratory, 1945-1965*, 19-2 SOCIAL SCIENCE HISTORY 169 (Summer 1995); Lisa Napoli, *The Puerto Rican Independentistas: Combatants in the Fight for Self-Determination and the Right to Prisoner of War Status*, 4 CARDENZO J. INT'L & COMP. L. 131, 157-58 (1996) (“Subordinate status, a means of control, is also created through subordinate treatment that is not necessarily political . . . One of the most notorious episodes was the experimentation with oral contraceptives in the 1950s, in which doses of hormones that were ‘considered prohibitive by U.S. standards’ were used. Another example of the absence of protection for individual rights is the mass sterilization of Puerto Rican women. The Puerto Rican government, using funds from the U.S. government and privately-funded U.S. foundations, sterilized up to one-third of the women of child-bearing age in Puerto Rico over a twenty-year period ending in 1968. [T]he nature of the colonial relations between Puerto Rico and the United States made coercion possible through population control”).

123. COLÓN ET AL., *supra* note 72, at 56; SCARANO, *supra* note 122, at 784.

124. COLÓN ET AL., *supra* note 72, at 56; SCARANO, *supra* note 122, at 784.

125. COLÓN ET AL., *supra* note 72, at 55; SCARANO, *supra* note 122, at 740-801.

126. COLÓN ET AL., *supra* note 72, at 79.

Notwithstanding this history, feminist groups in Puerto Rico welcomed *Roe v. Wade*. They demanded the liberalization of abortion laws and regulations to ensure access to safe, legal, and affordable abortions.¹²⁷ As a result of these developments, in 1974, a Puerto Rican doctor brought suit in the federal court for the District of Puerto Rico, challenging a set of conflicting anti-abortion provisions of the Puerto Rican Penal Code. Some of them prohibited abortion except, as in *Roe*, when necessary to preserve the pregnant woman's *life*. In light of *Roe* they were struck down.¹²⁸ Other provisions also banned abortion but had broader exceptions, permitting it when necessary to preserve the woman's *health or life*.¹²⁹ The federal court in Puerto Rico upheld the latter as consistent with *Roe* by broadly interpreting "health or life" to encompass both psychological as well as physical well-being.¹³⁰ Shortly thereafter in 1974, the Puerto Rican Penal Code was amended to completely prohibit abortion, with no distinction among trimesters, "except by therapeutic prescription made by a physician duly authorized to practice medicine in Puerto Rico *with a view to preserve the health or life of the mother*."¹³¹ The current statute is virtually identical.¹³²

In 1980, the Supreme Court of Puerto Rico was faced with a challenge to the pre-1974 abortion statute, which exempted from the prohibition abortions carried out to preserve *health or life*. In *Pueblo v. Duarte*,¹³³ a physician had been tried and convicted for performing an abortion on a sixteen-year-old woman in her first trimester of pregnancy. The Supreme Court upheld the statute. It followed the U.S. Supreme Court's interpretation of a similar statute in a less known case, *U.S. v. Vuitch*,¹³⁴ holding the statutory term "health" broad enough to include

127. *Id.* at 85.

128. *Montalvo v. Hernández*, 377 F. Supp. 1332, 1342-44 (D. PR, 1974). 33 LPRA § 1053 prohibited any person to provide a woman any drug or substance "with intent thereby to procure the miscarriage of such woman, *unless the same is necessary to preserve her life*." *See id.* at 1333 (emphasis added). *See also* 33 LPRA §§ 1054 (prohibiting abortion practices except when necessary to preserve women's "life").

129. *Montalvo*, 377 F. Supp. at 1344. 33 LPRA § 1051 prohibited anyone to "advise, or induce abortion, or to practice abortion on a pregnant woman" except when prescribed by a licensed physician "for the purpose of preserving *health or life*". *Id.* (emphasis added). *See also* 33 LPRA § 1052.

130. *Montalvo*, 377 F. Supp. at 1343-44.

131. Article 91 of the 1974 Penal Code stated:

Every person who permits, indicates, advises, induces or practices an abortion; any person who provides, supplies, administers, prescribes or causes a pregnant woman to take any medicine, drug or substance, or uses or employs any instrument or other means with the intent to procure the miscarriage of such woman, and any person who aids in the commission of any of such acts, except by therapeutic prescription made by a physician duly authorized to practice medicine in Puerto Rico with a view to preserve the health or life of the mother, shall be punished by imprisonment . . .

33 L.P.R.A. § 4010 (official translation) (emphasis added).

132. P.R. PENAL CODE, art. 111, 33 L.P.R.A. §4739.

133. 109 D.P.R. 596 (1980).

134. 402 U.S. 62 (1971) (reaffirmed in *Roe*'s companion case *Doe v. Bolton*, 410 U.S. 179, 191-92 (1973)).

psychological as well as physical considerations.¹³⁵ Interpreting the term *health* in such way, the Puerto Rico Supreme Court avoided striking down the statute and permitted abortions to be performed, not just during the first trimester, but also throughout the entire pregnancy *as a statutory matter*.¹³⁶ “Our legislation,” stated the Court, “happens to be more lax than the criteria adopted in *Roe v. Wade*, but the adoption of a stricter statute . . . is a matter to be left to the legislature’s best judgment.”¹³⁷ Because prior to *Roe* abortion had been *de facto* tolerated in Puerto Rico, this decision preserved the *status quo*, now with legal sanction.¹³⁸

As a constitutional matter, however, the Puerto Rican protection of privacy had nothing to do with this seemingly expansive holding. In the case’s preamble the Court announces with a grand epical tone that

in our times, few controversies usually provoke such diverse and complex problems like those that gravitate around abortion and its legal regulation . . . [O]n this matter there is no defined trend that marks a common trajectory among the different countries, and it is highly probable that given the nature of this problem, that trend will never emerge . . . [N]ever before had we confronted the [abortion regulation] and the values it represents with regard to the rights and prerogatives Puerto Ricans enjoy, under the Constitutions of Puerto Rico and the United States.¹³⁹

After those words one would expect the Court to engage in a reasoned elaboration of the rights and interests involved under the Constitution. Yet the *Duarte* decision made no further reference to the Constitution, and the constitutional promise of a more expansive and autochthonous protection of privacy vanished. Instead, the Court merely stated that since *Roe v. Wade* recognized this right, its rationale must be applied to Puerto Rico, proceeding then to discuss and solve the controversies under *Roe*’s guidelines and through statutory interpretation. But more worrying still, in a cryptic footnote it affirmatively abandoned the opportunity to examine one of the most important issues of our times in light of the Constitution:

135. *Vuitch*, 402 U.S. at 71-72.

136. In reality, abortions are not carried out in Puerto Rico after the second trimester. COLÓN ET AL., *supra* note 72, at 107.

137. *Duarte*, 109 D.P.R. at 609 (emphasis added) (translation supplied).

138. After *Roe*, the clandestine clinics began operating in the open; timidly at first but after *Duarte* in 1980 this situation was consolidated. COLÓN ET AL., *supra* note 72, at 93. The other, less important (doctrinally speaking), abortion cases in Puerto Rico are *Pueblo v. Najul Bez I* and *II*, 111 D.P.R. 417 (1981), *aff’d*, 114 D.P.R. 493 (1983) (An abortion conducted without adequate informed consent violates the statute. The woman in these cases was coerced by her boyfriend and his father. The doctor performed the abortion knowing she was under compulsion and unsure, even putting a blanket on her mouth to stop her from shouting; thus, the physician was found guilty of violating the prohibition for performing the abortion without informed consent and without an adequate “therapeutic indication,” which is a legal requisite).

139. *Duarte*, 109 D.P.R. at 597-98 (emphasis added) (translation supplied).

In our jurisdiction the privacy of the human being has express constitutional roots. The Commonwealth's Constitution . . . provides: "Every person has the right to the protection of law against abusive attacks on his honor, reputation and private or family life." Our Basic Law adopts in that expression a fundamental human appreciation for the protection of the dignity of man, which is essential for life itself However, in matters of abortion, we express that the extension of the protection that our Constitution grants is not broader than that which the United States Constitution provides; thus, we refer only to the latter.¹⁴⁰

Then Chief Justice José Trías Monge presented a vigorous critique against the Court on this respect: "In order to declare constitutional the articles here challenged it is not enough to invoke the Constitution of the United States. They must be analyzed in light of the Puerto Rican Constitution."¹⁴¹ In this light, he interpreted the broader parameters of the Puerto Rican Constitution as requiring an affirmative governmental duty to make physicians available to economically needy women. "[C]onstitutional law does not operate in a vacuum."¹⁴² To require—as the law does—that only licensed physicians be authorized to perform the procedure, but not providing the service to those who cannot pay for it, is tantamount to its prohibition.

The Court's opinion does not discuss the validity of the abortion legislation in light of the Puerto Rican Constitution. It seems that only reluctantly it accepted the minimum federal guidelines, *without explaining why these norms must be the only interpretation* of the Puerto Rican Constitution. Thus, the Court foreclosed any future expansion of the right.

Given, as we shall see, the substantive import of Puerto Rican constitutional text and history there is no justification for flooring Puerto Rico's privacy protection in such an unprincipled manner. To the extent that broad notions of privacy and human dignity are available in the Constitution of Puerto Rico, it is a violation to Puerto Rican constitutional principles to simply refer to the United States' constitutional minimum without any individual assessment of our constitutional background. Consequently, the general aim of this part is to confront the Supreme Court's unprincipled attitude toward this right and provide a suitable alternative.

This second part is presented in three movements. First, in section A, I outline how the Constitution of Puerto Rico structures the protection of privacy and its relation to the concept of human dignity. Second, in section B, I critically analyze the way the Supreme Court of Puerto Rico has addressed such protection. Third, I offer in section C methodological and substantive recommendations in order to

140. *Id.* at 599 n.5 (emphasis added) (translation supplied).

141. *Id.* at 631 (Trías, J., concurring in part and dissenting in part).

142. *Id.* at 632.

synchronize our constitutional protection of decisionmaking privacy with the Madman's interest in self-definition.

A. PRIVACY AND THE CONSTITUTION OF PUERTO RICO: HISTORY, TEXT AND THE SUPREME COURT

"The dignity of the human being is inviolable." – Art. II, § 1, P.R. Constitution (1952)

"Every person has the right to the protection of law against abusive attacks on his honor, reputation and private or family life." – Art. II, § 8, P.R. Constitution (1952)

The eighth section of the Puerto Rican Bill of Rights guarantees the protection of law against abusive attacks upon any person's private or family life, while the first section recognizes the inviolability of human dignity. Because both protections are clearly articulated in the constitutional text, unlike the implied right of privacy in the United States, they "are not, in our constitutional order, wandering entities in search of an author or juridical pigeonhole."¹⁴³

The Puerto Rican Constitution, in conjunction with the U.S. Supreme Court's substantive due process case law, guarantees an individual's ability to decide issues regarding childbearing, childrearing and education; contraception; procreation; abortion; marriage and divorce; intimate relations with same-sex partners; and death. But decisionmaking privacy in Puerto Rico has an unexplored potential. It is, in a way, dormant. Notwithstanding the explicit recognition of privacy and human dignity in the Constitution, as the abortion context demonstrates, the Supreme Court's commitment to the interests embodied by decision-making privacy has not been particularly strong. In fact, its attitude has been in most of these cases highly restrictive and, most of all, unprincipled.

In the following two subsections I will evaluate the basic constitutional ingredients upon which the argument of this Article is founded. I will proceed from the general to the particular. Accordingly, in subsection 1, I will first address the general history, text and structure of the constitutional protection of individual rights in Puerto Rico. Then, in subsection 2, I will specifically evaluate the two most pertinent sections of the Puerto Rico Bill of Rights: (a) Section I concerning the protection of human dignity and (b) Section 8 on the protection of private and family life.

1. Historical and Constitutional Foundations

The constitutional relation between the United States and Puerto Rico is extremely complex. It is filled with constitutional and historical instances of colonial politics that span a period of more than one hundred years and persist to this day. No brief account of this relationship will do justice to the subtleties of this history. Bracketing all the fundamental differences between states and United

143. Figueroa Ferrer v. E.L.A., 107 D.P.R. 250, 260 (1978).

States territories such as Puerto Rico, it is useful to clarify at this point that the relationship between the Puerto Rico Bill of Rights and federal individual rights is, in practical terms, *similar* to the relationship between a state's Constitution and the United States Constitution. That is, while the United States Constitution provides a set of minimum guarantees that protect individuals from federal and local state action, the Constitution of Puerto Rico is allowed to afford its citizens a broader set of rights.¹⁴⁴ In this vein, the story that follows is intended to capture the relevant themes of Puerto Rico's constitutional history in order to understand the view that the 1952 Puerto Rico Constitution has of individual rights.

In 1898, the U.S. acquired the Island of Puerto Rico from Spain as a result of the Hispanic-American War. During this period, as the United States grappled with the consequences of having obtained new territories overseas and experienced a growing "ideology of expansion,"¹⁴⁵ an important debate emerged among its political and scholarly elites about applying the U.S. Constitution to the newly acquired territories and population.¹⁴⁶

Because Puerto Rico had not been *incorporated* to the U.S. by Congressional action, the U.S. Supreme Court held that the Island was an *unincorporated territory*; that is, "a territory appurtenant and belonging to the United States, but not a part of the United States."¹⁴⁷ One immediate consequence of this category was that the population of Puerto Rico was held subject to broad Congressional authority under the Territorial Clause of the U.S. Constitution.¹⁴⁸ The scope of this authority was almost unlimited: *Congressional plenary powers were only restricted by those constitutional provisions that the U.S. Supreme Court determined ad hoc to be of a fundamental nature.*¹⁴⁹

Because the federal Organic Act that structured Puerto Rican political life from 1900 to 1917 lacked an insular Bill of Rights,¹⁵⁰ and because the United States Constitution's Bill of Rights was (and is) inapplicable to unincorporated

144. See *infra* text accompanying notes 177-179.

145. RIVERA-RAMOS, *supra* note 4 at 35-39; see also CHRISTINA BURNETT & BURKE MARSHALL EDS., FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION (2001).

146. 1 JOSÉ TRÍAS MONGE, HISTORIA CONSTITUCIONAL DE PUERTO RICO 236 (1980); RIVERA-RAMOS, *supra* note 4, at 39. Three contesting positions were articulated: (1) that the U.S. Congress had plenary powers over the new possessions without any constitutional constrain; (2) that Congress could not exercise any more power over the newly acquired territories than what it could exercise over the states, for the U.S. Constitution "followed the flag" and applied *ex proprio vigore* to the possessions and its inhabitants; and (3) that Congress could exercise plenary powers over those territories not deemed to have been *incorporated* into the United States, but that this broad authority was limited by *fundamental* constitutional provisions of a "universal" character. 1 TRÍAS MONGE, *supra*, note 146, at 236-42; RIVERA-RAMOS, *supra* note 4, at 75.

147. *Downes v. Bidwell* 182 U.S. 244, 287 (1901); *Balzac v. Porto Rico*, 258 U.S. 298 (1922).

148. U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . .").

149. *Downes*, 182 U.S. at 287 (White, J., concurring). See RIVERA-RAMOS, *supra* note 4, at 79; José Julián Álvarez González, *La Protección de los Derechos Humanos en Puerto Rico*, 57 REV. JUR. U.P.R. 133, 137 (1988).

150. Foraker Act, Act of April 12, 1900, 31 Stat. 77.

territories, the United States Supreme Court emerged as the only source of individual rights for Puerto Ricans as it determined through piecemeal adjudication which rights were important enough to limit Congress' plenary powers over non-incorporated territories. Between 1903 and 1917¹⁵¹ the Supreme Court held, for instance, that the right to grand jury indictment and the right not to be convicted absent a unanimous verdict were not fundamental.¹⁵² On the other hand, a deprivation of property without due process of law violated principles of a *fundamental* nature.¹⁵³ This process prevented the development of an authoritative and complete catalogue of individual rights demandable by Puerto Ricans.¹⁵⁴ In short, at least until 1917, Puerto Ricans "could claim the protection only of some, but not all, the rights that the American legal system formally sanctioned"¹⁵⁵ and their extension was at the whim of the fortuitous federal judicial process.¹⁵⁶

In 1917, however, Congress enacted a new Organic Law for Puerto Rico (the Jones Act).¹⁵⁷ This act provided a local Bill of Rights (transplanted from the analogous Philippine Organic Act), which contained almost all the individual guarantees of the U.S. Constitution,¹⁵⁸ and of course, no constitutional protection of privacy. The Bill of Rights only limited the government of Puerto Rico,¹⁵⁹ and remained in effect until the enactment of the current Constitution in 1952. Although the Jones Act brought more certainty regarding the formal right-protection regime, the U.S. Supreme Court in the subsequent years failed to provide precise answers concerning which of the individual rights guaranteed by the U.S. Constitution were fundamental in a constitutional sense.¹⁶⁰

151. Álvarez González, *supra* note 149, at 137 n.24 and cases therein cited.

152. See *Hawaii v. Mankichi*, 190 U.S. 197 (1903).

153. See *Ochoa v. Hernández*, 230 U.S. 139 (1913). See also Álvarez González, *supra* note 149; RIVERA-RAMOS, *supra* note 4, at 91.

154. ESCUELA DE ADMINISTRACIÓN PÚBLICA U.P.R., LA NUEVA CONSTITUCIÓN DE PUERTO RICO 130 (1954) [hereinafter LA NUEVA CONSTITUCIÓN].

155. RIVERA-RAMOS, *supra* note 4, at 94.

156. Moreover, at a local level, during that period the interpretation of federal constitutional guarantees by the Puerto Rico Supreme Court was similarly restrictive. The insular Court—which was at the time composed of judges appointed by the President of the United States—assumed a passive attitude in the protection of civil rights and, in its own words, limited its role to merely "administer[ing] the laws of this Island, as they are in the codes and statutes, without trying to usurp legislative or executive functions by pursuing the phantom of imaginary rights" *Ex parte Bird*, 5 D.P.R. 247, 270 (1904) (translation supplied). See also 1 TRÍAS MONGE, *supra* note 146, at 293.

157. Jones Act of 1917, 39 Stat. 951 (1917), 48 U.S.C.A. § 731 (West, WESTLAW through P.L. 110-111).

158. *Id.* art. 2. See 1 RAUL SERRANO GEYLS, DERECHO CONSTITUCIONAL DE ESTADOS UNIDOS Y PUERTO RICO 471 (1986); David Helfeld, *How Much of the United States Constitution and Statutes are Applicable to the Commonwealth of Puerto Rico?*, 110 F.R.D. 452, 455 (1986); 2 TRÍAS MONGE, HISTORIA CONSTITUCIONAL DE PUERTO RICO 67-70, 89 (1981).

159. RIVERA-RAMOS, *supra* note 4, at 213.

160. Helfeld, *supra* note 158, at 455. Between 1917 and 1952, the Court addressed the issue only once, in *Balzac v. Porto Rico*, 258 U.S. 298 (1922), where it held that the right to trial by jury was not fundamental as applied to unincorporated territories. But see *Duncan v. Louisiana*, 391 U.S. 145 (1968)

This legal history formed a backdrop for the 1952 Puerto Rican constitutional framers as they defined the scope and extent of the rights to be included in the new Constitution. And for an important segment of the Puerto Rican academic and political scene this limited individual rights protection was unsatisfactory. For instance, the highly influential report made by the School of Public Administration of the University of Puerto Rico to the 1952 Constitutional Convention criticized both the conservative model that the 1917 Bill of Rights embodied and the uncertain protection afforded by the U.S. Constitution of the so-called fundamental rights to unincorporated territories.¹⁶¹

This report also criticized the fact that “the legal limit imposed by the United States Supreme Court [was] reduced to an *ambiguous warning* that Congress may govern non-incorporated territories with ample discretion, but without going too far.”¹⁶² With this in mind, the report crystallized the *zeitgeist* of what the drafting of the upcoming Bill of Rights should be: an active effort to determine “which are the rights and forms of governmental organization that our country wishes to establish, by its own *democratic ideals* and its own *interpretation* of what is fundamental in the North American Constitution.”¹⁶³

Although the express outlook of some of the members of the Constitutional Convention regarding the 1917 Bill of Rights was sometimes complacent and apologetic, for it was certainly an improvement from the previous situation,¹⁶⁴

(holding that the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution includes the right to trial by jury for serious offenses—for it was deemed fundamental to the American scheme of justice—thus the *states* must afford such protection). The applicability of *Duncan* to Puerto Rico is unclear, for the Commonwealth has not been determined to be a state under the Fourteenth Amendment and *Balzac* and the *Insular Cases* are still good law. Furthermore, the Supreme Court has never held whether federal fundamental guarantees apply *directly* or indirectly through the Fourteenth Amendment. See *infra* note 178. As a formal matter, however, the right in question in *Duncan* and *Balzac* is recognized statutorily, but this shows that the term “fundamental” may still be regarded as different when applied to unincorporated territories than when applied to the states. See Alvarez González, *supra* note 149, at 149-50 (arguing that this difference is nonsensical because, after all, we are dealing with the same term: “fundamental”). In practice, rights that are fundamental for Fourteenth Amendment purposes are deemed applicable to Puerto Rico regardless of whether they apply through territorial incorporation in accordance with the *Insular Cases* or through selective Fourteenth Amendment incorporation. See *infra* note 178.

161. Regarding the first, the School of Public Administration of the University of Puerto Rico advised the framers that the new Bill of Rights had to avoid the extremism of both “utopian declarations and ultra-conservative prescriptions.” LA NUEVA CONSTITUCIÓN, *supra* note 154. As an example of such ultra-conservatism, it alluded to the Bill of Rights of the Philippine Constitution, which was similar to the 1917 Bill of Rights of the Jones Act, for they both contained only the minimal guarantees of the U.S. Constitution. See 2 TRÍAS MONGE, *supra* note 158, at 67, 89; LA NUEVA CONSTITUCIÓN, *supra* note 154, at 125. The report rejected the notion that the minimum constitutional protection that this Bill of Rights entailed was “broad, inclusive and precise enough to safeguard the rights and immunities of the . . . citizenry.” *Id.*

162. *Id.* at 131 (emphasis added).

163. *Id.* (emphasis in original).

164. At least one member of the Constitutional Convention praised the 1917 Organic Act as real improvement from the previous situation where no Bill of Rights was in place. The Delegate Mr. Barreto Pérez referred to the 1917 Organic Act as “a great step of improvement” because it contained among other things a Bill of Rights. 1 DIARIO DE SESIONES DE LA CONVENCIÓN CONSTITUYENTE DE PUERTO RICO

they all considered the existing minimal guarantees to be especially narrow and, thus, drafted the 1952 charter with a purposely expansive view and with the explicit desire to move away from the U.S.' limited approach. Thus, Puerto Rican framers conceived of a Bill of Rights broader than the U.S. Constitution (even when textually incorporating some of its guarantees) since these rights were intended to be a product of the Puerto Rican imagination and cultural experiences.¹⁶⁵ The framers strongly rejected a Bill of Rights that simply incorporated federal individual protections without any independent vitality. Referring to the spirit of this Bill of Rights, the then Governor of Puerto Rico and delegate to the Constitutional Convention stated that the 1952 Bill of Rights not only recognized the individual rights guaranteed by the 1917 Organic Act, but also that

*in many of its aspects and in various of its guarantees, it goes beyond, and in some cases well beyond, those guarantees in the [1917] Organic act. [The Bill of Rights] is important even in the case of those rights that were similarly guaranteed by the Organic Act. It means that, now, these rights are not generously sent by the good and democratic U.S. Congress based on an Anglo-Saxon tradition that comes from afar . . . but rather these rights, and in some cases the profound expansion of those human rights, come from the work and consciousness of Puerto Ricans. They come from the intelligence, sympathy, generosity and justice of the Puerto Rican people, and from knowing the value that the most distressed and underprivileged human beings represent for democracy.*¹⁶⁶

Other important historical factors framed the constitutional enactment process: First, and extremely important in the privacy context, the Constitution borrowed from contemporary international human rights instruments such as the *American Declaration of the Rights and Duties of Man* of 1948 and the Universal Declaration of Human Rights. In this sense, the Constitution of Puerto Rico exemplifies the influence of the burgeoning post war international preoccupation with the protection of “universal” values such as human dignity and individual

707 (1961) (translation supplied). See also statement by Muñoz Marín that the previous organic act guaranteed some rights “because of the generous and democratic spirit of the U.S. Congress.” 2 DIARIO DE SESIONES DE LA CONVENCIÓN CONSTITUYENTE DE PUERTO RICO 1210 (1961) (translation supplied) [hereinafter 2 DIARIO DE SESIONES]. See also *infra* text accompanying note 166.

165. That background cultural experience contained, of course, an American component. It must be noted that the drafters were part of an elite that was, on a considerable part, educated in American universities and whose members were the ideological, and sometimes biological, descendants of an earlier generation that saw the U.S. occupation of Puerto Rico as a promise of development and political improvement. RIVERA-RAMOS, *supra* note 4, at 214-15. Hence, the Bill of Rights retained both the language and the guarantees already provided for in the Jones Act of 1917 and the U.S Constitution reportedly to benefit from previous judicial and doctrinal construction of those provisions. 3 TRÍAS MONGE, HISTORIA CONSTITUCIONAL DE PUERTO RICO 70 (1982).

166. 2 DIARIO DE SESIONES, *supra* note 164, at 1210 (translation supplied) (emphasis added).

rights.¹⁶⁷

A second historical element is the ideological impetus of the relevant political elites. The main political actors in charge of drafting the Bill of Rights were part of a very distinct generation in Puerto Rican political history. The Bill of Rights embodied “the worldview of the Puerto Rican elites that led the process of economic, social and political reform during the 1940s.”¹⁶⁸ The framers’ generation achieved, with U.S. support, unprecedented administrative and socio-economic reforms, which geared the country into industrialization and positioned it within the prevalent ideal of progress.¹⁶⁹ They were, thus, optimistic in their efforts. They generally shared a reformist attitude and harbored a belief in the necessity and desirability of an expansive Bill of Rights.¹⁷⁰

The framers’ drive is also evidenced by the fact that the Bill of Rights included an expansive notion of State protection that encompassed social and economic “aspirational” rights; although sadly—as a condition for its approval of the Constitution—the U.S. Congress eliminated the section that included all these economic guarantees.¹⁷¹ Also, the Bill of Rights included a section with a text similar to that of the Ninth Amendment to the U.S. Constitution, which states that “[t]he foregoing enumeration of rights shall not be construed restrictively nor does it contemplate the exclusion of other rights not specifically mentioned which belong to the people in a democracy.”¹⁷² This provision, although rarely referred to by the Court, explicitly rejected the principle of *inclusio unius, exclusio alterius*, and infused the text with the needed flexibility to recognize the requirements and realities of the times.¹⁷³

167. “[S]ince the Second World War it would be inadequate or even misleading to develop a framework for the study of human rights in many countries without including as a major ingredient the international, legal and political aspects of the field: laws, processes and institutions.” HENRY STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 57 (2000). See also H. Lauterpach, *International Law and Human Rights*, in *id.* at 147-153; Carlos Gorrín Peralta, *Human Rights: Individual and Collective Freedom for the Satisfaction of Human Needs*, in 2 RAÚL SERRANO GEYLS, DERECHO CONSTITUCIONAL DE ESTADOS UNIDOS Y PUERTO RICO 764 (1988). This preoccupation also flourished among many American intellectuals of the forties. A preoccupation reflected by a certain confidence in universal values and truth, and marked by a condemnation of “relativism” and its supposed inability to reject totalitarianism. EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE 218-31 (1973).

168. RIVERA-RAMOS, *supra* note 4, at 214.

169. SCARANO, *supra* note 122, 719-26.

170. TRIÁS MONGE, *supra* note 165, at 169-170.

171. *Id.* at 209-12. Section 20 of the Constitution included the recognition of the rights to obtain work; to have a standard of living adequate for the health and well-being of the person and his or her family (especially to food, clothing, housing and medical care and necessary social services); to have social protection in the event of unemployment, among others. These rights were aspirational to the extent that the text conditioned them to the development of the economy of Puerto Rico.

172. P.R. CONST. art. II, § 19.

173. 4 DIARIO DE SESIONES DE LA CONVENCIÓN CONSTITUYENTE DE PUERTO RICO 2576 [hereinafter 4 DIARIO DE SESIONES]; 3 TRIÁS MONGE, *supra* note 165, at 207-09. The Court has at times applied the interpretative view expressed in this section, albeit without referring to it explicitly. See e.g. Figueroa Ferrer v. E.L.A., 104 D.P.R. 436 (1975).

This historical background is highly relevant for the study of Puerto Rico's current Bill of Rights and must serve as the platform from which to conduct our constitutional analysis. The Puerto Rico Supreme Court has recognized its importance for interpreting individual rights in the Island's Constitution:

Inspired by the Universal Declaration of Human Rights, the Constitution of the Commonwealth of Puerto Rico has an origin and historical background different from that of the United States Constitution. The reformist spins of the "forties generation" and the liberal bent of the members of the Constitutional Convention characterized the standards used to select our claimable rights With the help of the extensive constitutional experience of the United States, we have set up the minimum safeguards of fundamental rights. *However, our Bill of Rights allows us to venture further in the defense of human rights Our Constitution recognizes and grants some fundamental rights with a more ample and protective vision than those in the United States Constitution. When construing its scope, we should guarantee its vigor and relevance for the socioeconomic and political problems of our times.*¹⁷⁴

Of course, an expansive judicial approach alone is not enough to fill the existing gap between the formal declaration of rights and their enjoyment.¹⁷⁵ However, it is still important for the Court to recognize and enforce these rights to the broadest possible extent "because of their concrete impact on legislative power and individual right and because constitutional ideas reflect and shape our culture."¹⁷⁶

2. Sections 1 and 8 of the Constitution of Puerto Rico's Bill of Rights

In Puerto Rico, the right to privacy is guaranteed by the interplay between the protections afforded by the U.S. and the Puerto Rican Constitutions (and their interpreting jurisprudence). In practical terms, the relation between both jurisdictions *regarding the protection of individual rights* is similar, if not identical, to the relation between a state and the federal government.¹⁷⁷ Thus, the Constitution of Puerto Rico must protect, at a minimum, those individual rights guaranteed to Puerto Ricans

174. López Vives v. Policía de Puerto Rico, 118 D.P.R. 219, 226-27 (1987) (translation taken—but modified—from Luis Aníbal Avilés Pagán, *Human Dignity, Privacy and Personality Rights in the Constitutional Jurisprudence of Germany, the United States and the Commonwealth of Puerto Rico*, 67 REV. JUR. U.P.R. 343, 382 (1998)). See also ELA v. Hermandad de Empleados, 103 D.P.R. 436, 439-40 (1975) (emphasizing the uniqueness of the Puerto Rican right to privacy).

175. As Rivera-Ramos points out, one of the limits to the full enjoyment of civil rights in contemporary Puerto Rico is the high degree of poverty. This limits the needed access to the judicial system while at the same exposes poor communities to police brutality more than others. Women are paid less than men and suffer discrimination in the judicial system. Also, gays, lesbians, and immigrants from neighbor islands are subject to pervasive discriminatory practices by both public officials and private individuals. RIVERA-RAMOS, *supra* note 4, at 215-16.

176. Law, *supra* note 57, at 956-57 (reflecting on the importance of constitutional concepts in the context of sex equality, even if the advancement of such concepts alone is not enough to approach such equality).

177. See Helfeld, *supra* note 158, at 456-58.

by the U.S. Constitution,¹⁷⁸ but it can concede a broader protection as it already does.¹⁷⁹ The explicit protection of the *privacy* is provided in Section 8 of the Bill of Rights¹⁸⁰ and the more general protection of *human dignity* in Section 1.¹⁸¹

The U.S. Constitution does not literally guarantee the right of privacy. Furthermore, when the Puerto Rican Constitution was enacted in 1952 only two state constitutions contained some reference to privacy, both within the context of search and seizure protection.¹⁸² And it was not until the late 1960s that some states began amending their

178. See *Pueblo v. Dolce*, 105 D.P.R. 422, 427 (1976) (recognizing that Puerto Rico must protect at a minimum the rights guaranteed by the U.S. Constitution). The U.S. Supreme Court has applied the rights to freedom of expression, due process of law, equal protection, the right to travel and the protection against unreasonable searches and seizures to Puerto Rico. See *RIVERA-RAMOS*, *supra* note 4, at 212 and cases therein cited. After the enactment of the Constitution in 1952 the U.S. Supreme Court has refrained from determining whether federal fundamental rights are applicable to Puerto Rico *directly* or through the Fourteenth Amendment. *Calero v. Pearson Yacht Co.*, 416 U.S. 663, 668-69 n.5 (1974) ("The District Court deemed it unnecessary to determine which Amendment applied to Puerto Rico . . . , and we agree."); *Examining Board v. Flores de Otero*, 426 U.S. 572, 601 (1976) ("The Court, however, thus far has declined to say whether it is the Fifth Amendment or the Fourteenth which provides the protection . . . Once again, we need not resolve that precise question."). This reluctance is due to the implications of such determination: The implication of applying rights through the Fourteenth Amendment is that of characterizing Puerto Rico as a state, while the implications of direct application would be to define the current Commonwealth status as an extension of the federal government. *Helfeld*, *supra* note 158, at 456. The nature of the current status of the Commonwealth is, of course, highly controversial. In any event, because the *fundamental* rubric is used to incorporate federal rights both to states and unincorporated territories (through the doctrines of selective and territorial incorporation, respectively) it has been held that there is no difference between the rights applied to the states and to the territories. *Montalvo v. Hernández Colón*, 377 F. Supp. 1332 (D.P.R. 1974) (applying the federal right to privacy to the Commonwealth in the context of abortion). Also, it has been suggested by Justice Brennan (joined by Justices Stewart, Marshall and Blackmun) that most of the U.S. Bill of Rights should be applied to Puerto Rico. *Torres v. Puerto Rico*, 442 U.S. 465, 474 (1979) ("Appellee concedes that the Fourth Amendment applies to the Commonwealth of Puerto Rico Whatever the validity of the [*Insular Cases*] in the particular historical context in which they were decided, those cases are clearly not authority for questioning the application of the Fourth Amendment—or *any other provision of the Bill of Rights*—to the Commonwealth of Puerto Rico in the 1970's.") (emphasis added). But note that the right to trial by jury in some criminal cases has not been held to be fundamental as applied to unincorporated territories, but fundamental with regard to states. See *supra* note 160.

Puerto Rican cases start from the premise that the federal right to privacy is applicable to Puerto Rico as a minimum, but not a maximum, guarantee to be the Island's inhabitants. See e.g. *Pérez Vega v. Procurador*, 148 D.P.R. 201, 218-19 (1999); *Pueblo v. Duarte Mendoza*, 109 D.P.R. 596, 599 n.5 (1980); Cf. J. Trías Monge, concurring, at 613-14 (advancing an alternative "agreement" theory for the application of U.S. fundamental rights to Puerto Rico).

179. See *Pueblo v. Dolce*, 105 D.P.R. 422, 427 (1976); *López Vives v. Policía de Puerto Rico*, 118 D.P.R. 219, 226-27 (1987). See also William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

180. "Every person has the right to the protection of law against abusive attacks on his honor, reputation and private or family life." P.R. CONST. art. II, § 8.

181. "The dignity of the human being is inviolable." P.R. CONST. art. II, § 1.

182. The Washington Constitution has provided since 1889 that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." WASH. CONST. art. 1, § 7 (1889). The Constitution of Arizona has stated since 1910, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." ARIZ. CONST. art. II § 8 (1910). See ROBERT ELLIS SMITH, *COMPILATION OF STATE AND FEDERAL PRIVACY LAWS* 50-51 (1997 & 2000 Supp.); Ken Gormley & Rhonda G. Hartman, *Privacy and the States*, 65 TEMP. L. REV. 1279, 1282 (1992).

constitutions to include several variations of the right.¹⁸³ Moreover, contemporary notions of privacy in 1952 were somewhat different than those common today, because the Constitution was enacted almost 13 years before the U.S. Supreme Court began using the “privacy” label to identify some personal and family autonomy interests in *Griswold v. Connecticut*.¹⁸⁴

The question must then be asked: What was “privacy” considered to be when it was included in the 1952 Constitution? The debates at the Constitutional Convention may present an idea as to the scope of the right to “privacy” at the time, and more importantly its relation to the concept of human dignity. It must be noted, however, this question is raised only to attain a point of departure and not a fixed understanding of the relevant constitutional provisions.

a. *Privacy and Human Dignity.* The Report of the Bill of Rights Committee to the Constitutional Convention, commenting on Section 8, stated that

[t]he protection against abusive attacks on honor, reputation and private life constitutes a principle that complements the concept of *human dignity* protected by this Constitution. *It is about personal inviolability in its most complete and ample form.* Honor and intimacy are individual values that deserve the most complete protection, not only against offenses by particular persons, but also against abusive interference of governmental authorities. The formula proposed in section 8 covers both aspects. It constitutionally complements section 10 and covers the field known in North American law as the “right of privacy” which is of particular importance in the modern world.¹⁸⁵

This statement is highly revealing in two respects. First, it states that the right

183. The non-informational kind of privacy has been adopted by five states between 1972 and 1980 after *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Roe v. Wade*, 410 U.S. 113 (1973). These are: Alaska (1972) (“The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.” ALASKA CONST. art. I, § 22); Montana (1972) (“The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a state interest.” MONT. CONST., art. II, § 10); California (1974) (“All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.” CAL. CONST. art. I, § 1); Hawaii (1978) (“The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right.” HAW. CONST. art. I, § 6); and Florida (1980) (“Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein.” FLA. CONST. art. I, § 23.) Gormley & Hartman, *supra* note 182, at 50-51. Four states have adopted aggressive search and seizure provisions after *Katz v. U.S.*, 389 U.S. 347 (1967). *Id.* See Meléndez-Juarbe, *supra* note 17 (explaining the factors that led to an increased interest in privacy within the United States in the late 1960’s and in the 1970’s).

184. 381 U.S. 479 (1965). *See infra* Part II-B.

185. 4 DIARIO DE SESIONES, *supra* note 173, at 2566 (1961) (translation supplied) [hereinafter Report of the Bill of Rights Committee to the Constitutional Convention] (The phrase “right of privacy” is stated in English in the original.).

to privacy complements the constitutional protection of *human dignity*, and in that connection, that the protection against abusive attacks upon honor, reputation and private or family life "is about personal inviolability in its most complete and ample form." Second, the last sentence refers to two different aspects of the right to privacy: (1) the one contained in Section 10 of the Bill of Rights (protection against unreasonable searches and seizures),¹⁸⁶ which Section 8 complements; and (2) the North American "*right of privacy*," which was stated in the original passage in the English language, as a term of art.

The wording, "every person has the right to the protection of law against abusive attacks on his honor, reputation and private or family life," directly incorporates Article 5 of the *American Declaration of the Rights and Duties of Man* of 1948.¹⁸⁷ At the same time, the framers specifically referred to the North American "*right of privacy*" and underscored its particular importance in the "modern world."¹⁸⁸ As is characteristic of our political reality, this statement reflects the hybridity of belonging to a mixed system jurisdiction that is influenced by both American and Continental legal traditions. In the case of privacy, the Puerto Rican Constitution benefits from American privacy understandings and from the continental legal tradition that inspired privacy provisions in postwar international instruments, which currently shapes the European approach to privacy.¹⁸⁹

Any reading of the right to privacy in Puerto Rico must begin with the premise that, in the Puerto Rican Constitution, privacy is considered "a specific

186. Section 10 of the Bill of Rights prohibits unreasonable searches and seizures. This protection in some respects is analogous to the Fourth Amendment to the U.S. Constitution. See P.R. CONST. art. II §10 ("The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated Wire-tapping is prohibited No warrant for arrest or search and seizure shall issue except by judicial authority and only upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons to be arrested or the things to be seized Evidence obtained in violation of this section shall be inadmissible in the courts."). For an analysis of the scope of this protection in Puerto Rico *vis-à-vis* the U.S. Constitution's protection, see Ernesto L. Chiesa, *Los Derechos de los Acusados y la Factura Más Ancha*, 65 REV. JUR. U.P.R. 83, 126-45 (1996).

187. Article 5 of the *American Declaration* states that "[e]very person has the right to the protection of law against abusive attacks upon his honor, his reputation and his private and family life." *American Declaration of the Rights and Duties of Man* (approved by the Ninth International Conference of American States in the Bogotá Conference, May 2, 1948), in CENTER FOR THE STUDY OF HUMAN RIGHTS, TWENTY-FIVE HUMAN RIGHTS DOCUMENTS 194 (1994). See also 3 TRIAS MONGE, *supra* note 165, at 89; Cortés Portalatín v. Hau Colón, 104 D.P.R. 734, 738 (P.R. 1975). It is also similar to Article 12 of the *Universal Declaration of Human Rights*, which states: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference of attacks." Universal Declaration of Human Rights (adopted and proclaimed by United Nations General Assembly, December 10, 1948) in TWENTY-FIVE HUMAN RIGHTS DOCUMENTS 6, 7 (1994). See generally STEINER & ALSTON, *supra* note 167, at 868.

188. See 4 DIARIO DE SESIONES, *supra* note 173.

189. See James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L. J. 1151 (2004).

application of the basic constitutional concept of human dignity.”¹⁹⁰ Simply stated, and as the Court has recognized, privacy is thought to be “subsumed and [to] complement[] the broader concept of ‘human dignity.’”¹⁹¹ Human dignity, in turn, as intended by the Constitutional Convention, is the basic premise of the entire Bill of Rights. The president of the Bill of Rights Committee of the Constitutional Convention explained that the “ideological architecture”¹⁹² of the Bill of Rights

is summarized by this first sentence: *the dignity of the human being is inviolable*. This is the basic bedrock principle of democracy. Within it lies democracy’s strength and moral vitality. Because, before anything else, democracy is a moral force and its morality resides precisely in the recognition of the dignity of the human being; on the high respect that this dignity deserves; and the consequent responsibility that every constitutional order has to rely on this dignity, protect it and defend it.¹⁹³

The president went on to specify that this provision “sets the ground for human equality”; an equality that “transcends biological, ideological, religious, political or cultural differences” and that beyond those differences there is a human “transcendental dignity.”¹⁹⁴

Whatever one may think about the indeterminacy of such grand concepts,¹⁹⁵ and of the non-essential nature of one’s personhood and identity,¹⁹⁶ the Constitutional Convention decided to include the right to privacy under this general protection of human dignity, and it did so under the direct guidance of the then recent human rights declarations.¹⁹⁷

Human dignity is a widely used concept among international instruments, and its meaning is highly contested.¹⁹⁸ Although this is not the place to compre-

190. NOTES AND COMMENTS ON THE CONSTITUTION OF THE COMMONWEALTH OF PUERTO RICO 39 (1952).

191. *Vocero v. E.L.A.*, 131 D.P.R. 356, 428 n.39 (1992) (emphasis added) *rev’d*, *El Vocero v. Puerto Rico*, 113 S.Ct. 2004 (1993).

192. 2 DIARIO DE SESIONES, *supra* note 164, at 1103 (translation supplied).

193. *Id.* (statement by Mr. Jaime Benítez).

194. *Id.*

195. Compare Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935) and *Lochner v. New York*, 198 U.S. 45 (1905) (Holmes, J., dissenting) with Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1105-07 (1975) (regarding the possibility of attaining a general concept of human dignity).

196. See DANIELSEN, & ENGLE, *supra* note 88, at xv (describing post-identity politics as an effort to simultaneously affirm identities and to resist “the essentializing tendency towards the organizing of politics around single and presumably stable identity categories”).

197. See 3 TRÍAS MONGE, *supra* note 165, at 174. Both the Universal Declaration of Human Rights (1948) (Art. 1) and the American Declaration of the Rights and Duties of Man (1948) (Preamble) include the recognition of human dignity as their point of departure. See CENTER FOR THE STUDY OF HUMAN RIGHTS, TWENTY-FIVE HUMAN RIGHTS DOCUMENTS 6, 194 (1994).

198. As Schachter has stated,

hensively try to define its contours, the most diverse authorities on the subject have recognized that human dignity is generally associated with the notion of *respect for the intrinsic worth of every person* or, in a word, "*personhood*."¹⁹⁹ Those who have tried to give precise content to this principle have identified, as an important corollary, the protection of *autonomous choice in the development of personal identity*. For one commentator human dignity entails that "a high priority should be accorded in political, social and legal arrangements to *individual choices* in such matters as belief, way of life, attitudes and the conduct of public affairs."²⁰⁰ In this view, human dignity includes the particular recognition "*of a distinct personal identity, reflecting individual autonomy and responsibility*."²⁰¹ Others have asserted that, in terms of its claimability,

No other ideal seems so clearly accepted as a universal social good We do not find an explicit definition of the expression 'dignity of the human person' in international instruments or (as far as I know) in national law. Its intrinsic meaning has been left to intuitive understanding, conditioned in large measure by cultural factors

Oscar Schachter, *Human Dignity as a Normative Concept*, in STEINER & ALSTON, *supra* note 167, at 401.

199. See Alan Gewirth, *Human Dignity as the Basis of Human Rights*, in MICHAEL MEYER & WILLIAM PARENT, THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 10, 12 (1992) ("[D]ignity signifies a kind of intrinsic worth that belongs equally to all human beings as such, constituted by certain intrinsically valuable aspects of human being."); Louis Henkin, *Human Dignity and Constitutional Rights*, in MEYER & PARENT, *supra* note 199, at 210 ("Specifically, human dignity requires respect for every individual's physical and psychic integrity, for his (her) 'personhood' before the law, for her (his) autonomy and freedom; these are not to be lightly sacrificed, even for the welfare of the majority or for the common good." *Id.* at 210-11); William A. Parent, *Constitutional Values and Human Dignity*, in MEYER & PARENT, *supra* note 199, at 46. See also BRAD STETSON, HUMAN DIGNITY AND CONTEMPORARY LIBERALISM 15 (1998).

Compare Oscar Schachter, *Human Dignity as a Normative Concept*, in STEINER & ALSTON, *supra* note 167, at 401 (finding at the core of the concept the notion of respect for the intrinsic worth of every person) with Rhoda Howard, *Dignity, Community, and Human Rights*, in STEINER & ALSTON, *supra* note 167, at 398. Howard offers an account of the concept of human dignity that highlights its uncertain and culturally relative character, and denies the possibility that one would have standing to assert a dignity claim against the U.S. government simply because she is a human being. In any event, and aside from its relativism and nominalism, this account still identifies dignity with a certain notion of the inner worth of the human person. Howard writes, "I define human dignity as *the particular cultural understandings of the inner moral worth of the human person and his or her proper political relations with society*. Dignity is not a claim that an individual asserts against a society; it is not, for example, the claim that one is worthy of respect merely because one is a human being. Rather, dignity is something that is granted at birth or on incorporation into the community as a concomitant of one's particular ascribed status . . ." *Id.* at 399 (emphasis in original).

The concept of human dignity that is used in international conventions and in the Constitution of Puerto Rico is the one called *inherent dignity*, which commentators identify with the idea of intrinsic worth of human beings. It is conceptually different from *empirical dignity*, which refers to "a kind of gravity or decorum or composure or self-respect or self-confidence together with various good qualities that may justify such attitudes" (i.e. acting in a "dignified manner"). Alan Gewirth, *Human Dignity as the Basis of Rights*, in MEYER & PARENT, *supra* note 199, at 10, 12.

200. Oscar Schachter, *Human Dignity as a Normative Concept*, in STEINER & ALSTON, *supra* note 167, at 401.

201. *Id.* at 402.

[i]t furnishes each one of us, whether strong or weak, politically powerful or disenfranchised, competent or retarded, and whatever our race, religion, sex, or sexual orientation, with an indefeasible moral standing to protest . . . all insidious attempts to degrade our persons.²⁰²

In short, the notion of human dignity “focuses on the ability of the independent moral agent to make choices about her life, the result of which is that deprivations of dignity occur when those choices are neither respected nor permitted.”²⁰³

Such is the approach of many European constitutions and international human rights documents such as the European Convention of Human Rights and, prominently, the German Constitution. While Article 1 of the German Basic Law states that “Human dignity shall be inviolable,” this encompassing constitutional notion must be seen together with Article 2, which states that “[e]veryone shall have the right to the free development of his personality.” “The human dignity clause is almost always read in tandem with the general liberty interests secured by the personality, inviolability, and right-to-life clauses of Article 2. The relationship between Article 1 and 2 is symbiotic”²⁰⁴ As summarized by Eberle, “[h]uman dignity and its realization are the common denominators of personality law, animating freedom of action, inner freedom, and autonomy rights.”²⁰⁵ Thus, the Federal Constitutional Court has stated:

The free human person and his dignity are the highest values of the constitutional order. The state in all of its forms is obliged to respect and defend it. *This is based on the conception of man as a spiritual-moral being endowed with the freedom to determine and develop himself.*²⁰⁶

The U.S. Constitution makes no reference to human dignity nor is the concept usually associated with its text.²⁰⁷ In Puerto Rico, however, because of the particular structure and history of the Bill of Rights, the Supreme Court has

202. William A. Parent, in MEYER & PARENT, *supra* note 199, at 62. It has been argued also that, “[h]uman dignity is so important that it serves not only as a foundation for many constitutional rights but also as a significant constraint on the scope of other rights.” Thus, it has been thought of as a principle that may limit First Amendment protections in light of the human degradation entailed in child pornography and even adult participation obscene material. Martha Minow, *Equality and the Bill of Rights*, in MEYER & PARENT, *supra* note 199, at 118, 125.

203. Frederick Schauer, *Speaking of Dignity*, in MEYER & PARENT, *supra* note 199, at 178, 187.

204. DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 298 (1997).

205. EDWARD J. EBERLE, DIGNITY AND LIBERTY: CONSTITUTIONAL VISIONS IN GERMANY AND THE UNITED STATES 128 (2002).

206. Life Imprisonment Case (1977), 45 BVerfGE 187, in KOMMERS, *supra* note 204, at 306, 307 (emphasis added). See also, e.g., Mephisto Case (1971) in KOMMERS, *supra* note 204 at 301, 30 BVerfGE 173; Census Act Case (1983), 65 BVerfGE 1, in KOMMERS, *supra* note 204, at 323.

207. Louis Henkin, *Human Dignity and Constitutional Rights*, in MEYER & PARENT, *supra* note 199, at 211, 212.

applied the notion of human dignity *jointly* with the right to privacy in various and diverse instances.²⁰⁸ Furthermore, the Court has explicitly afforded to this particular combination the highest possible rank in the hierarchy of constitutional values.²⁰⁹

It is then under the umbrella concept of human dignity that the Supreme Court has interpreted the content of *privacy*. Hence, it is through this lens that we must read the explanation articulated by the Report of the Bill of Rights Committee to the Constitutional Convention in the passage cited at the introduction to this section: that the right to privacy, as related to the concept of human dignity, is “about personal inviolability in its most complete and ample form.”²¹⁰ This said, the human dignity protection in the Puerto Rico Constitution has been underutilized. The fact that other individual rights are architected within it, does not mean that human dignity cannot be understood as a stand-alone protection. Unfortunately²¹¹ the Puerto Rico Supreme Court has not been able to recognize human dignity’s independent value, although the Constitution’s text, history and structure mandate otherwise. The Court tends to interpret dignity as a sort of backup singer to other important rights.

The Constitution’s commitment to the central dignity values of personhood and identity definition must be considered independently, regardless of other distinct rights, such as privacy. This commitment seems evident, not only from what has been discussed so far as to the primacy of dignity values in the Constitution, but also in other constitutional contexts. For instance, in the case of educational rights, the Constitution promises that “[e]very person has the right to

208. See *Vocero v. E.L.A.*, 131 D.P.R. 356, 428 n. 39 (1992) (recognizing the right to privacy jointly with human dignity in the context of press access to criminal preliminary hearings); *Arroyo v. Rattan Specialties Inc.*, 117 D.P.R. 35, 58-60, 62 (1986) (declaring unconstitutional the mandatory use by private employers of polygraph upon employees emphasizing that “the rights to dignity, personal integrity, and privacy are fundamental constitutional rights that have the highest position in the constitutional hierarchy and constitute a crucial dimension of human rights”); *P.R. Tel. Co. v. Martínez*, 114 D.P.R. 328, 346-48 (1983) (establishing criteria for validly renouncing the constitutional protection against the interception of telephone conversations); *Colón v. Romero Barceló*, 112 D.P.R. 573, 579 (1982) (recognizing a private cause of action against unauthorized publication of one’s image); *Figueroa Ferrer v. E.L.A.*, 107 D.P.R. 250, 276 (1978) (recognizing a constitutional right to legally attain a “no-fault” divorce by mutual consent). See also *Avilés Pagán*, *supra* note 174 (considering the development of some aspects of the right to privacy in Puerto Rico, United States and Germany, and equating it with the concept of human dignity). The Constitution of Spain, which guarantees the right to “honor, personal and family intimacy, and to self image” as well as the concept of human dignity, CONST. ESP. arts. 10.1, 18.1, has been interpreted by the Constitutional Court to have a similar hierarchical and derivative relation: “The rights to self image and to personal and family intimacy . . . are no doubt derived from the dignity of the person recognized under article 10 of the [Constitution].” STS 231/1998, December 2, 1998, cited in JOSÉ MARTÍNEZ DE PISÓN CAVERO, *EL DERECHO A LA INTIMIDAD EN LA JURISPRUDENCIA CONSTITUCIONAL* 93-94 (1993).

209. *P.R. Tel. Co.*, 114 D.P.R. at 340 (“The previous analysis reveals the real nature of the right to privacy. Undoubtedly it deserves primacy among the pyramid of constitutional rights.”); *Colón*, 112 D.P.R. at 573.

210. See *supra* note 185.

211. See *infra* section II(B)(3)0 (“Human Dignity as a Backup Singer”).

an education which *shall be directed to the full development of the human personality* and to the strengthening of respect for human rights and fundamental freedoms.”²¹² In other words, while the right to privacy absorbs human dignity values, human dignity in itself provides its own light as to the protection of self-definitional interests.

b. *Protection from abusive attacks against “Honor, reputation and private or family life”*. As noted, privacy in Puerto Rico should be seen within the context of Puerto Rico’s constitutional protection of human dignity as conceived in the Continental tradition. At the same time, while speaking of privacy, the framers referred to what is known in “North American law as the ‘right of privacy’ which is of particular importance in the modern world.”²¹³

Considering the historical and textual context of these statements, it seems clear that one of the main preoccupations with the protection of “private or family life” was associated with what is known as tort privacy.

In 1952, the prevailing notion of privacy in American law was that which Samuel Warren and Louis Brandeis identified at the turn of the century in their famous and influential article, *The Right to Privacy*.²¹⁴ In that article, the authors proposed that the common law already recognized an identifiable right to privacy, which was based on the broader principle of the “inviolate personality.”²¹⁵ They argued for the recognition of a private action based on this right to privacy, particularly in light of the rapidly increasing technological developments they witnessed.

Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing the individual what Judge Cooley calls the right “*to be let alone*.” Instantaneous photographs and newspaper enterprises have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that “what is whispered in the closet shall be proclaimed from the housetops.”²¹⁶

As Prosser noted in an important 1960 article, during the first half of the twentieth century, the majority of the American courts had recognized four different types of torts associated with privacy, which responded to separate interests. These were (1) intruding upon a person’s seclusion or solitude; (2) publicly disclosing embarrassing private facts; (3) placing a person in false light

212. P.R. CONST. OF 1952, art. II § 5.

213. 4 DIARIO DE SESIONES, *supra* note 173.

214. Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

215. *Id.* at 205. As Horwitz argues, the article is a paradigmatic example of the trust in conceptualism and analogical reasoning that characterized the classical legal thought of the turn of the century. HORWITZ, *supra* note 23 at 205.

216. Warren & Brandeis, *supra* note 214, at 195 (emphasis added).

in the public eye; and (4) appropriating one's name or likeness.²¹⁷ Prosser's description consolidated in American law the basic categories that define the scope of current tort privacy.²¹⁸ By disaggregating privacy in these pieces, Prosser expunged from it the substantive component of *inviolable personality*. Since Warren and Brandeis rooted privacy in broader principles, criticisms against its four-part articulation immediately arose.²¹⁹ In any event, while the Puerto Rican right to privacy was seen particularly tied to the broader concept of human dignity—and thus conceived to be about “personal inviolability in its most complete and ample form”²²⁰—it also sought to address the American legal recognition of privacy that had emerged at the time, as later described by Prosser.

The record of the Constitutional Convention reveals these insights. More than once, members of the Convention emphasized that privacy protected the individual against others' curiosity in one's personal affairs²²¹ and, as it has been stated, they specifically referred to this widespread American notion of privacy. Also, and consistent with this view of privacy, they envisioned this right to be actionable against private persons, while the references to privacy protections against government action seem to be mostly tied to search and seizure violations.²²²

Currently, however, the enforcement of the right to privacy against private individuals has been extended to all modes of the right including decisionmaking privacy, irrespectively of this original emphasis in tort privacy.²²³

217. Prosser, *supra* note 12, reprinted in *PHILOSOPHICAL DIMENSIONS*, *supra* note 75. For the development of each of these modes of tort privacy, and their formulation in the Restatement of Torts (Second), see TURKINGTON & ALLEN, *supra* note 41, at 398-584 (1999).

218. TURKINGTON & ALLEN, *supra* note 41, at 398.

219. Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962 (1964), reprinted in *PHILOSOPHICAL DIMENSIONS*, *supra* note 75, at 156. Bloustein rejected the fragmented approach followed by Prosser and emphasized that offenses to privacy are affronts to human dignity, *i.e.*, to “the reasonable sense of personal dignity.” *id.* at 187. For Bloustein the injury suffered is “to our individuality, to our dignity as individuals, and the legal remedy represents a social vindication of the human spirit thus threatened rather than a recompense for the loss suffered.” *Id.* at 188.

220. See Report of the Bill of Rights Committee to the Constitutional Convention, *supra* note 185.

221. The President of the Bill of Rights Committee, Mr. Jaime Benítez, explained that this right protected an ambit of intimate life particularly “in these times when a growing unhealthy curiosity develops regarding each person.” 2 DIARIO DE SESIONES, *supra* note 164, at 1105 (translation supplied). At another point one delegate asked Mr. Benítez what was the meaning of “private life” that this section protected, and he responded that it referred to “the right you have of not being snooped upon your private life.” 3 DIARIO DE SESIONES DE LA CONVENCIÓN CONSTITUYENTE DE PUERTO RICO 1627 (1961); see also statements by delegate Trías Monge in 3 DIARIO DE SESIONES, *id.* at 1586.

222. Hence, the Bill of Rights report to the Convention stated that privacy is an individual value that “deserve[s] the most complete protection, not only against offenses by *particular persons*, but also against *abusive interference of governmental authorities*. The formula proposed in section 8 covers both aspects [(private and governmental interference)]. It constitutionally complements section 10 [(protection against governmental unreasonable searches and seizures)] and covers . . . the [American] “right of privacy” [(private action)].” 4 DIARIO DE SESIONES, *supra* note 173.

223. See, e.g., Belk Arce v. Martínez, 146 D.P.R. 215, 227-28 (1998) (stating that the right to marry, as a privacy protected interest, is actionable against private individuals, although in that case the right was

The framers of course could not foresee the conceptual evolution this right would experience in the mid-1960's post-*Griswold*. However, because the right to privacy in Puerto Rico is especially tied to the concept of human dignity, we must not feel constrained within the tort privacy paradigm. We must embrace a broader vision of this right and see clearly the many dimensions that lie within it. This much the Court has acknowledged when ruling on privacy cases, although it has failed to provide a coherent approach for the future.

This conceptual hybridity may explain the Court's erratic path when approaching decisionmaking privacy's contours. But this indeterminacy should not necessarily be perceived as a shortcoming. It is precisely in this hybridity that we will find adequate substantive content for the future development of our right to privacy as seen through the aegis of the independent values of our human dignity protection.

In the following subsection I will briefly look at some of the constitutional norms that surround the right to privacy as construed by the Supreme Court of Puerto Rico in order to grasp the strengths and weaknesses of its interpreting case law. Then I will examine some of the factors that have impeded the development of a coherent view of decisionmaking privacy. Taking the judicial construction of this right jointly with the Constitution's text and history, at the end of this section we will be better suited to propose a substantive and methodological approach for this right.

B. TOWARDS AN EXPANSIVE AND PRINCIPLED PROTECTION

So far, I have mainly tried to demonstrate two things. First, as a methodological issue, the legal and historical context that led up to the enactment of the Puerto Rican Constitution and the framers' attitudes towards the scope of the Bill of Rights justifies an expansive reading of its text. Second, as a substantive matter, the notion of privacy embodied in the Puerto Rican Constitution reflects both a concern for U.S. tort law and, more importantly, the broader concept of human dignity.

However, the Court has not been consistent in either dimension. Methodologically, it usually proclaims privacy's importance among all rights in the Constitutional hierarchy; however, to what extent such prominence is reflected in the decision-making privacy case law is, to say the least, doubtful. Substantively, the Court has not even made a sustained effort to adequately define this right's content consistently with the Constitution's text and history. This approach is, in short, expansive but unprincipled.

actually made applicable through the enforcement of an act which prohibits private discrimination based on marriage); Arroyo v. Rattan Specialties Inc., 117 D.P.R. 35 (1986) (declaring unconstitutional a private employer's regulation dealing with the use of the polygraph on its employees).

1. A Partially Expansive Protection

The Supreme Court of Puerto Rico has developed three particular privacy norms that are background rules in all privacy cases, regardless of their kind, and that illustrate the Court's generally expansive approach. These are: (1) that the constitutional right to privacy operates *ex proprio vigore*, i.e., that there need not be a legislative enactment enabling a person to seek a remedy for its violation;²²⁴ (2) that the right to privacy can be claimed against private individuals, without the need for state action;²²⁵ and (3) that as a general matter, Puerto Rico's right to privacy has a broader scope than the parallel protection in the United States, for it is considered to be at the highest possible level in the hierarchy of constitutional values.²²⁶ I am mainly concerned with the last of these and the extent to which the

224. This rule was initially developed in civil actions in the context of tort privacy. Thus, while sustaining a civil action against the government for violation of privacy during an illegal search, the court affirmed that “[t]he fact that there is no approved law defining the contours of privacy, does not relieve us from our obligation to give validity to the constitutional provision, for it is common knowledge that constitutional provisions are . . . self-executing.” *Alberio Quiñónez v. E.L.A.*, 90 D.P.R. 812, 816 (1964). Similarly, in *González v. Ramírez Cuerda*, 88 D.P.R. 125, 133 (1963), the Court sustained a cause of action for false imputations regarding the chastity of a woman. Rather than find the cause of action amounted to slander under the libel and slander statute, the court held it cognizable under the constitutional protection against abusive attacks on honor. *See also E.L.A. v. Hermandad de Empleados*, 104 D.P.R. 436, 440 (1975); *Arroyo v. Rattan Specialties Inc.*, 117 D.P.R. 35, 64 (1986); *Belk Arce*, 146 D.P.R. at 215 (applying the rule with regard to the right to marry).

225. *E.L.A. v. Hermandad de Empleados*, 104 D.P.R. 436, 440 (1975); *Rattan*, 117 D.P.R. 35, 64. As for remedies, it has been held that a plaintiff may seek either damages or injunctive relief. *Colón v. Romero Barceló*, 112 D.P.R. 573, 576 (1982) (monetary damages); *Sucn. De Victoria v. Iglesia Pentecostal*, 102 D.P.R. 20, 30 (1974) (injunctive relief). To the extent that this rule is applicable to non-tort privacy cases, commentators have pressed the Court to deal with the articulation of different rules for individual and governmental defendants. It is argued that, since the government may only prevail in the face of a violation of privacy if it demonstrates a compelling state interest, it would be an exceedingly heavy burden for a private individual to demonstrate such justification. The consequence may be, it is said, that the Court will end up lowering the justificatory threshold for individuals and, unless it separates the norms for each type of defendant, it will concomitantly lower the bar for the government as well. *See Álvarez González, supra note 149*, at 172; 2 SERRANO GEYLS, *supra note 167*, at 1068; DEMETRIO FERNÁNDEZ QUIÑONES, DERECHO ADMINISTRATIVO Y LEY DE PROCEDIMIENTO ADMINISTRATIVO UNIFORME § 5.5, 255 (2001). *See also J. Clark Kelso, California's Constitutional Right to Privacy*, 19 PEP. L. REV. 327, 407 (1992). The Court has not yet clearly responded to these claims. *Sostre Lacot v. Echlin*, 126 D.P.R. 781, 797 (1990) (Negrón García, dissenting); *Belk Arce*, 146 D.P.R. 215. To be sure, the risk of a lowered protection is important. But it is a real concern only to the extent that we expect absolute coherence and consistency from the Supreme Court in every privacy context. To the extent that privacy claims are contextual and have different justifications, Solove, *supra note 82*, at 1128, each claim or class of claims deserves a different analytical approach. *See also Solove, supra note 94*.

In California, for instance, where the constitutional right to privacy applies to private parties, the Supreme Court has acknowledged privacy's multi-faceted character and has refused to adopt a one-size-fits-all rigid standard relying on a balancing-of-interests test. *See Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633 (Cal. 1994).

226. In relation to the comparison between Puerto Rico's and the United States' constitutional protections *see E.L.A. v. Hermandad de Empleados*, 104 D.P.R. 436, 440 (1975); *Figueroa Ferrer v. E.L.A.*, 107 D.P.R. 250, 258-59 (1978); *Arroyo v. Rattan Specialties Inc.*, 117 D.P.R. 35, 60 (1986). Regarding privacy's rank among individual rights *see P.R. Tel. Co. v. Martínez*, 114 D.P.R. 328, 339 (1983); *Colón v. Romero Barceló*, 112 D.P.R. 573, 582 (1982). *But see* text accompanying note 250, *infra* for some limits to this rank (referring to First Amendment constitutional limitations).

Court has actually applied it in a principled manner to all privacy associated interests.

Aside from those privacy interests in the areas of search and seizure and freedom of the press, the range of substantive interests that the Court has identified within the constitutional protection is extensive. These include (1) protection to the tranquility of one's home from unwanted nuisances produced by outrageously loud noises from neighbor's religious rituals;²²⁷ (2) privacy protection against residential picketing (recognized thirteen years before the Supreme Court upheld a law prohibiting such action in *Frisby v. Schultz*);²²⁸ (3) protection from private employer's use of polygraph ("lie detectors") on employees as a condition for work;²²⁹ (4) tort actions for unauthorized appropriation of one's image;²³⁰ (5) prohibition against unauthorized telephone wiretapping, which has a specific constitutional protection;²³¹ (6) protection regarding the collection, disclosure and citizen's access to personal information;²³² and (7) protection from private video surveillance in the workplace,²³³ among

227. *Sucn. De Victoria v. Iglesia Pentecostal*, 102 D.P.R. 20 (1974); *Gayetano Lasso v. Iglesia Pentecostal*, 129 D.P.R. 219 (1991).

228. 487 U.S. 474 (1988); *E.L.A. v. Hermandad de Empleados*, 104 D.P.R. 436 (1975).

229. *Arroyo v. Rattan Specialties, Inc.*, 117 D.P.R. 35 (1986).

230. *Vigoreaux Lorenzana v. Quizno's Sub, Inc.*, 2008 TSPR 38, 2008 WL 668228 (P.R.); *López Tristani v. Maldonado Carrero*, 2006 TSPR 143, 2006 WL 2635837 (P.R.); *Colón v. Romero Barceló*, 112 D.P.R. 573, 576 (1982).

231. The Puerto Rico Constitution provides that "[w]ire-tapping is prohibited." P.R. CONST. art. II, § 10. *See P.R. Tel. Co. v. Martínez*, 114 D.P.R. 328, 343 (1983) (the right is not absolute and may be implicitly or explicitly renounced); *U.T.I.E.R. v. A.E.E.*, 149 D.P.R. 498, 508 (1999) (same).

232. Regarding the *collection* of information *see Noriega v. Hernández Colón*, 122 D.P.R. 650 (1988); *Noriega v. Hernández Colón*, 130 D.P.R. 919 (1992) (a decades-old repulsive governmental practice of making dossiers and surreptitiously collecting information of individuals solely for political reasons and used for political persecution was declared to be a violation of freedom of speech and association as well as the right to privacy).

With regard to *disclosure* of information, *see Rodríguez v. Scotia Bank*, 113 D.P.R. 210 (1982) (holding that income tax return information is discoverable, but that the constitutional right to privacy protects against its indiscriminate discovery, and narrows its disclosure by requiring that such information be more than pertinent in an evidentiary sense. Instead it must be "strictly pertinent." *Id.* at 216-17). *See also General Electric v. Concessionaries, Inc.*, 118 D.P.R. 32 (1986); *Chévere v. Levis*, 150 D.P.R. 525 (2000). *But see Ramos Vélez v. Int'l Reporting Servs.*, 1994 P.R. Sup. LEXIS 5, at *9-10 (1994). (holding that financial and tax return information is pertinent, under *Scotia Bank*, in light of plaintiff's allegations of defendant's personal use of corporation's assets). *See also Rullán v. Fas Alzamora*, 2006 TSPR 5, 2006 WL 146231 (P.R.).

Concerning the *access* to personal information, this right is protected as a corollary of the Puerto Rican free speech constitutional provision, CONST.P.R. art. II, § 4; *Soto v. Secretario de Justicia*, 112 D.P.R. 477 (1982) and the right to privacy. *See Pueblo v. Torres Albertorio*, 115 DPR 128, 134-35 (1984) (recognizing a privacy right to obtain original criminal record upon acquittal). In *López Vives v. Policía de Puerto Rico*, 118 D.P.R. 219 (1987), Justice Naveira de Rodón, in a concurring opinion, linked the right to have access to personal information in the hands of the government to an informational privacy right. The right to informational privacy includes, according to Justice Naveira, the following situations: (1) the acquisition of information by the government; (2) the prolonged retention by government of such information; (3) the disclosure of such information to third parties or other governmental agencies without consent; and (4) the access by the citizen of her personal information as gathered by the government. One central aspect of the right to privacy, states the Judge, is the notion of *control*. Thus,

others.²³⁴ In all of these instances, the Court has recognized and protected the right to privacy to a great extent.²³⁵

On the other hand, the Supreme Court has recognized other privacy interests in family relations, individual autonomy, and reproductive freedom. Specifically, the court has recognized privacy interests in cases dealing with (1) marriage and family issues that have arisen in custody and divorce as well as in private discrimination disputes,²³⁶ (2) the right to obtain a divorce by mutual consent without being separated for two years as mandated by the Civil Code of Puerto Rico or alleging a fault-based cause,²³⁷ and, reluctantly following the federally mandated minimum, (3) women's right to an abortion as part of a recognized interest in reproductive autonomy.²³⁸ In this second group, the Court also addressed (but denied recognition as a legitimate privacy interest) the claim of an unmarried couple to jointly adopt a child under their legal custody²³⁹ and the claim by a postoperative male-to-female transsexual to have her official sex changed in her birth certificate.²⁴⁰ The Puerto Rico Supreme Court has also denied standing to homosexuals to challenge the local sodomy statute²⁴¹ and it

access to personal information that the government holds is crucial for the individual's control of that information's accuracy, and for knowing what information the government possesses. *Id.* at 242-253. Cf. *Whalen v. Roe*, 429 U.S. 589 (1977) (upholding a New York statute that required a centralized computer record system for prescriptions of certain drugs, which included patients names and addresses). Naveira's conclusion was later adopted by the Court in *Torres Ramos v. Policía*, 143 D.P.R. 783, 798 (1997). However, more recently, the Court ignored this privacy interest in access to personal information when denying a woman's right to obtain a video with personal embarrassing images that was consigned in court, when judicial proceedings had already been concluded. *López Tristani v. Maldonado Carrero*, 2006 TSPR 143, 2006 WL 2635837 (P.R.).

233. *Vega Rodríguez v. Telefónica de Puerto Rico*, 156 D.P.R. 584, 609-10 (2002) (establishing criteria for the constitutionality of video surveillance in the context of private employment).

234. See, e.g., *Vocero v. E.L.A.*, 131 D.P.R. 356 (1992) (right to privacy limits press access to criminal preliminary hearings) *rev'd*, *El Vocero v. Puerto Rico*, 113 S.Ct. 2004 (1993); *Fulana de Tal y Sutana de Cual v. Demandado A*, 138 D.P.R. 610 (1995) (restricting press or public access to videotape evidence showing plaintiffs having sexual relations with defendant).

235. This protection is, of course, far from perfect. In the telephone wiretapping jurisprudence, for instance, where there is an absolute prohibition in the Constitution, the Court has shown signs of diminishing the protection by widening the situations in which a person is said to consent to its renouncement. See, e.g., *U.T.I.E.R. v. A.E.E.*, 149 D.P.R. 498, 508 (1999).

236. *Sterzinger v. Ramírez*, 116 D.P.R. 762, 779 (1985) (parent's right to maintain relations with biological son or daughter is a protected privacy interest); *García Santiago v. Acosta*, 104 D.P.R. 321, 324-25 (1975) (privacy and family relations are supreme, but the State may intervene when the best interest of the child justifies the provisional or permanent removal from the custody of grandparents); *Belk Arce v. Martínez*, 146 D.P.R. 215, 226-28 (1999) (recognizing a cause of action for discrimination based on constitutional protection of marriage although primarily interpreting a discrimination statute); *Sostre Lacot v. Echlin*, 126 D.P.R. 781, 782 (1990) (Negrón García, J., dissenting).

237. *Figueroa Ferrer v. E.L.A.*, 107 D.P.R. 250 (1978).

238. *Pueblo v. Duarte*, 109 D.P.R. 596 (1980); *Pueblo v. Najul Bez*, 111 D.P.R. 417 (1981), 114 D.P.R. 493 (1983).

239. *Pérez Vega v. Procurador*, 148 D.P.R. 201 (1999).

240. *Ex parte Alexis Delgado Hernández*, res. el 30 de junio de 2005, 2005 TSPR 95, 2005 WL 1593435 (P.R.). Compare *Ex parte Alexandra M. Torres*, 151 D.P.R. 794 (2000) (ruling without Court Opinion, conferring such remedy).

241. *Sánchez v. Srio de Justicia*, 157 D.P.R. 360 (2002).

failed to recognize homosexuals' status as a protected group under the concept of "person" in Puerto Rico's domestic violence law.²⁴² Of course, the realm of activities that the U.S. Supreme Court has considered under the privacy rubric, which include contraception, child-rearing and education, the right to marry, and the so-called right to die, complements the list above.

The rule that the right to privacy in Puerto Rico has broader parameters than the federal counterpart has been rhetorically extended to all modes of the right, especially in information privacy cases.²⁴³ However, the Court has not been so enthusiastic with reproductive autonomy issues (*i.e.* abortion) and non-conventional family and individual autonomy matters (*i.e.* adoption by unmarried couples and sex-change constitutional recognition). This double standard makes no sense in our constitutional context; the right to privacy, jointly with the recognition of human dignity, requires bolstering the protection of the second set of situations in order to reinforce the Madman's interest in defining his identity.

Aside from this double standard with regard to the *strength* of the protection, the Court has not been consistent as to the conceptual bounds of the right to privacy in any context. This generally expansive albeit unprincipled approach will be examined in the paragraphs that follow.

2. The Expansive but Unprincipled Approach

The particular background of the Puerto Rican Constitution, and specifically, the distinct source of the privacy clause, has always been an important element in the Court's understanding of this protection, the ambitiousness of its boundaries and, most importantly, the breadth of the Court's interpretative leeway. In *Cortés Portalatín v. Hau Colón*,²⁴⁴ for instance, the Court emphasized that this constitutional clause:

is an exact repetition of Art. V of the American Declaration of the Rights and Duties of Man, and is related to Art. 12 of the Universal Declaration of Human Rights. Thus, *this section represents*, like many others, *a principle with aspirations of universality, distilled from diverse juridical systems. Broad is the world given to us for its just interpretation*. It is not constrained by specific games of historical

242. *Pueblo v. Leandro Ruiz Martínez*, 159 D.P.R. 194 (2003).

243. See, e.g., *E.L.A. v. Hermandad de Empleados*, 104 D.P.R. 436 (1975); *Figueroa Ferrer v. E.L.A.*, 107 D.P.R. 250 (1978); *Belk Arce v. Martínez*, 146 D.P.R. 215 (1998); *Soc. de Ganaciales v. Royal Bank de P.R.*, 145 D.P.R. 178, 202 (1998). See also *Sostre Lacot v. Echlin*, 126 D.P.R. 781, 782 (1990) (Negrón García, J., dissenting). Cf. *Arroyo v. Rattan Specialties*, 117 D.P.R. 35 (1986); *López Vives v. Policía de Puerto Rico*, 118 D.P.R. 219, 244 (1987) (Naviera de Rodón, concurring). These cases recognize the right to *privacy* as encompassing the entire range of activities from informational and tort interests to personal autonomy, family, and reproductive issues. For the proposition that the Puerto Rican protection of privacy is broader than the one recognized in the United States see *Figueroa Ferrer*, 107 D.P.R. at 258-59; *Hermandad de Empleados*, 104 D.P.R. at 440; *Rattan Specialties*, 117 D.P.R. at 60; *Colón v. Romero Barceló*, 112 D.P.R. 573, 582 (1982); *P.R. Tel. Co. v. Martínez*, 114 D.P.R. 328, 339 (1983).

244. 103 D.P.R. 734 (1975).

rules. Our obligation is to obey the constitutional mandate in accordance with other provisions of our primary law and the country's realities.²⁴⁵

Similarly, in *E.L.A. v. Hermandad*,²⁴⁶ after emphasizing that the recognition of this protection in the Constitutional text reflected a particular Puerto Rican ethos, the Court highlighted the international instruments from which privacy emerged as a specific justification for liberal departure from narrow views:

The recognition of the right to privacy in the Constitution of Puerto Rico responded basically to two factors. First, it responded to a concept of the individual deeply embedded in our culture

Second, [the framers] wanted to formulate a Bill of Rights of broader scope than the traditional, which would reflect commonly shared beliefs of different cultures regarding new categories of rights. Hence, the Universal Declaration of Human Rights and the American Declaration of Rights and Duties of Man exercised a significant influence on the content of our Bill of Rights.²⁴⁷

The right to privacy in Puerto Rico supposedly "deserves primacy among the pyramid of constitutional rights."²⁴⁸

These statements show the Court's eagerness, at times, to expand the protection of privacy, and the flexibility with which it has interpreted its scope. And, to be sure, the statements are extremely important because they begin from Puerto Rico's constitutional history and text and forcefully project the right to privacy. However, although the federal right to privacy provides a constitutional floor that Puerto Rico's protection may liberally surpass, other rights with which privacy may conflict could pose a limiting ceiling to such leeway.²⁴⁹ Thus, as Álvarez González has argued, to the extent that some of these and other like assertions construing the right to privacy are made in the context of its clash with freedom of expression interests, the degree of the protection in these cases is not as broad as the Court would like it to be, but rather, as broad as the Supreme Court

245. *Id.* at 738 (emphasis added) (translation supplied).

246. 104 D.P.R. 436 (1975).

247. *Id.* at 439-40 (emphasis added) (translation supplied). The same emphatically strong protection was announced in Figueroa Ferrer v. ELA, 107 D.P.R. 250, 261 (1978) ("the right to privacy and the protection afforded to the dignity of the human being are not, in our constitutional order, wandering entities in search of an author or juridical pigeonhole. The Constitution consecrates them in clear texts.").

248. P.R. Tel. Co. v. Martínez, 114 D.P.R. 328, 340 (1983) (translation supplied). *But see E.L.A. v. P.R. Tel. Co.*, 114 D.P.R. 394, 401 (1983) (holding that the right to privacy "occupies a privileged place in within the spectrum of the rights that the Constitution protects . . . [But] [t]his does not mean that the right to privacy triumphs over every other conflicting value in every conceivable case." *Id.* at 401).

249. Note, *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1334-35 (1982).

of the United States would allow it.²⁵⁰

On the other hand, although these expressions of commitment to privacy suggest a one-way ratchet and an open-ended expansion of the right, they provide little indication about the type of activities protected. Not surprisingly, then, several commentators have strongly criticized the Puerto Rican privacy jurisprudence for its lack of precision regarding its substantive contours and unprincipled scope.²⁵¹ The main proponent of this criticism has been Professor Álvarez González, who once stated that:

[t]he Puerto Rican decisions in the area of privacy cover an immense range of situations. Some are entirely acceptable; others present difficulties. There is, however, one common feature among them. *There is, by the Court, not even an effort to find a unifying theory of this right for its application to the most diverse circumstances.* At times, the most it could be concluded is that some situation appeared to be sufficiently “private” or objectionable to a majority of the judges.²⁵²

This critique, however, must be put into perspective, for the goal of having a unifying theory for all dimensions of privacy is exceedingly ambitious. As already argued, privacy is multidimensional. There is, as one author put it, “no universally accepted philosophical definition of ‘privacy.’ Attempts to give an account of the meaning of ‘privacy’ have been almost as varied as they have been numerous.”²⁵³ Comprehensive uniformity is hard to achieve, if not impossible, where the range of interests under the privacy rubric is quite broad and the

250. Álvarez González, *supra* note 149, at 172. See, e.g., *Vocero v. E.L.A.*, 131 D.P.R. 356 (1992) (holding that the right to privacy limits press access to criminal preliminary hearings in Puerto Rican courts), *rev'd*, *El Vocero v. Puerto Rico*, 113 S.Ct. 2004 (1993) (the First Amendment guarantees to the press access to such proceedings).

251. Álvarez González, *supra* note 149, at 172-73; FERNÁNDEZ QUIÑONES, *supra* note 225, at § 5.5; Avilés Pagán, *supra* note 174, at 372. Cf. José Dávila Caballero, *El Denominado Estatuto de Sodoma de Puerto Rico*, 69 REV. JUR. U.P.R. 1185, 1231-35 (2000) (arguing that despite its imprecise scope, some principles can be distilled from the Court's jurisprudence, i.e., that it is at a higher scale in the constitutional hierarchy than other rights and that it applies *ex proprio vigore* and *erga omnes*). But these principles this last author identifies have nothing to do with the substantive content of the right.

252. Álvarez González, *supra* note 149, at 172-73 (translation supplied).

253. UNEASY ACCESS, *supra* note 75, at 5.

Some authors have defined privacy around the unitary concept described by Warren and Brandeis, in Warren & Brandeis, *supra* note 214 (“the right to be let alone”); see, e.g., Paul A. Freund, *Privacy: One Concept or Many*, in NOMOS XIII, *supra* note 75.

Others have proposed one or other variation of the idea of *control*, which may or may not include autonomy-based strands of the right, compare Hyman Gross, *Privacy and Autonomy*, in NOMOS XIII, *supra* note 75, at 169, 180-181 (defining privacy as “the condition under which there is control over acquaintance with one's personal affairs by the one enjoying it” and distinguishing privacy from autonomy), with Schoeman, *supra* note 104 (Schoeman's account of privacy as related to a different notion of control aimed at fostering relationships and its relation to autonomy interests).

Also, other accounts try to organize privacy within the idea of *respect for persons and dignity*, see Ben, *supra* note 85, at 228 (“I am suggesting that a general principle of privacy might be grounded on the more general principle of respect for persons”); Edward J. Bloustein, *Privacy as an Aspect of Human Dignity*:

particular activities it encompasses so diverse. As Professor Judith Wagner DeCew argues, "it is not possible to give a unique, unitary definition of privacy that covers all the diverse privacy interests."²⁵⁴

Thus, one must be careful not to aim at all-encompassing and rigidly absolute theories of such fluid concepts as privacy, even while trying to define some general contours for one or several dimensions of this right. That is why the values here identified represent a selection of the most important ideals (and the most consistent with the Constitution's text and history) that should be taken into consideration when approaching decisionmaking privacy's contours. That is, the objective is to identify self-definition as an important, but not exclusive, value. In the decisionmaking context, the Madman's interest in self-definition is crucial; in other contexts, such as governmental and private surveillance, self-definition is important because outward identity projection is implicated, but anonymity, freedom of expression, and democratic interests may be more relevant.

In spite of privacy's multidimensional character, Álvarez González's critique is correct. Even in the midst of all the aforementioned expansive rhetoric, the Court has made *no effort* to assert at least some conceptual parameters of this

An Answer to Dean Prosser, 39 N.Y.U. L. REV. 962 (1964), reprinted in PHILOSOPHICAL DIMENSIONS OF PRIVACY, *supra* note 75, at 156.

Ruth Gavison, on the other hand, emphasizes the idea of *access*, as an organizing principle. See Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L. J. 421 (1980), reprinted in PHILOSOPHICAL DIMENSIONS OF PRIVACY, *id.* at 346 (privacy as limited access in the terms of "secrecy, anonymity, and solitude" *id.* at 354). Also, while recognizing the lack of consensus regarding the boundaries and definitions of privacy, Anita Allen *selects* the *restricted-access* approach and defends one notion that defines privacy as "a degree of inaccessibility of persons, their mental states, and information about them to the senses and surveillance devices of others." *UNEASY ACCESS*, *supra* note 75, at 34.

Other definitions include: privacy as the "condition of not having undocumented personal knowledge about one possessed by others," Parent, *supra* note 75; or as the "claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others." WESTIN, *supra* note 114.

Some authors prefer not to embrace any grand theory and prefer a fragmented approach. See William Prosser, *Privacy*, 48 CAL. L. REV. 338 (1960), reprinted in PHILOSOPHICAL DIMENSIONS OF PRIVACY, *supra* note 75, at 104; while others deny that such concept actually exists independently, see Judith Jarvis Thompson, *The Right to Privacy*, 4 PHIL. & PUB. AFFAIRS. 295, 313 (1975) (arguing that the right to privacy is derivative from other independent rights because "it is possible to explain in the case of each right in the cluster [of privacy] how come we have it without ever once mentioning the right to privacy").

Finally—and this is the general approach here adopted for being more manageable, practical and inclusive—other authors assume the view that privacy should be conceived as a cluster of separated but related interests. One of such views presents privacy as covering three main interests over which the agent must be safeguarded its control. Those interests are: intimate information, intimate access, and intimate decisions. INNESS, *supra* note 77, at 56. Inness believes that intimacy is the unifying concept which "draws its meaning and value from [the agent's] love, liking, or care." *Id.* at 75. Thus privacy is "the state of the agent having control over decisions concerning matters that draw their meaning and value from the agent's love, caring or liking." *Id.* at 91. For a similar *related-cluster approach* which takes into account these three interests, *namely*, access, information and decisions, but which does not posits in *intimacy* the element that relates them but rather as more practical strategy see WAGNER DECEW, *supra* note 76, described at *supra* Part I(D), text accompanying notes 90-118 and *infra* Part II(C)(2), text accompanying notes 325-334.

254. WAGNER DECEW, *supra* note 76, at 61.

protection. Puerto Rican privacy-protective cases suggest that despite the Court's serious commitment to its defense, the scope of what is private is limited to cases' factual scenarios. As a result, there are no durable principles of a substantive character to lead an analysis of its jurisprudence. As Rubenfeld has stated, "At the heart of the right to privacy, there has always been a conceptual vacuum."²⁵⁵

To illustrate this point, I offer a series of examples, each from a different area of the right to privacy. Some of them stand out as both landmark privacy cases in Puerto Rico and as eloquent examples of this boundless jurisprudence. All of them implicate one particular technique employed by at least one member of the Court to surreptitiously limit decisionmaking privacy's reach: compartmentalization.

3. Three Examples of Interpretative Disorganization and Instances of Compartmentalization

Compartmentalization describes a particular adjudication technique that reduces constitutional claims to their factual setting and refuses to recognize rights in the Constitution at a higher level of generality. Compartmentalization segregates constitutional rights into different instances as if they were composed of these separate propositions unrelated at a more general level. It negates efforts to draw from precedents durable constitutional principles applicable to future cases.²⁵⁶

For example, imagine I claim the State has violated right *X*, and that even though *X* is not textually recognized in the Constitution, I claim it is protected by right *P*. Under *P* the Court has previously recognized rights *A*, *B*, *C*, and *D*. I claim that *A*, *B*, *C*, and *D* must be related in *some way and for a reason* because, after all, they have been recognized under the umbrella of right *P*. Thus, my claim for right *X* is that there is a constitutional principle embodied by *P* which unites *A*, *B*, *C*, and *D* and that, applying this principle, my right *X* should be recognized in the same way. Of course, constitutional adjudication (using contested mechanisms of constitutional interpretation) would manipulate the level of generality of the principle that unites *A*, *B*, *C*, and *D* so as to include or exclude my right *X* from the list. This is, undeniably, a political process. But in the process, a flexible yet uniting principle would emerge and a concrete, though porous, meaning would be given to the Constitution. Compartmentalization would ignore all this, and would simply reject my claim for *X* stating that *X* is not equal to *A*, *B*, *C*, or *D*, looking at the latter at a low level of generality. Not searching for some general contours of right *P* and looking only at the catalogue it comprises forecloses any possibility of expanding the list and explicitly recognizes that the previous collection of protected activities follows no internal logic, being, thus, an arbitrary selection.

255. Rubenfeld, *supra* note 27, at 739.

256. See generally LAURENCE TRIBE & MICHAEL DORF, ON READING THE CONSTITUTION (1991).

a. *The Lie Detector Case: Arroyo v Rattan Specialties (Hernández Denton's compartmentalization)*. In *Arroyo v. Rattan Specialties*,²⁵⁷ per Justice Naveira de Rodón, the Court struck down as unconstitutional a private employer's requirement that employees undergo periodical polygraph testing. The plaintiff refused to submit to the test on several occasions. He was suspended and, under the regulation, soon discharged.

The boundaries of the protection are described in *Rattan* using an important, but by itself insufficient, criterion: the idea of *control*. According to this case, the privacy interest with which the "lie detector" interfered was the ability to *control* one's thought. In this sense the decision is grounded upon one's freedom of thought (the mind and thought being for the Court quintessentially private areas) and the right to *control* others' intrusion with that freedom into that intimate space.

Regardless of the degree of reliability that the polygraph test could reach, its intrusion upon the mind of the human being, with his thoughts, is such that *he loses the freedom to control the disclosure of his own thoughts*. This encroachment upon man's privacy can only be tolerated in the absence of less drastic means for protecting compelling State interests, and even then, only in the presence of adequate guarantees that assure that such invasion is limited to what is strictly necessary.²⁵⁸

To the extent that the polygraph intrudes into the mind, and measures responses and even refusals to respond, the test entails the loss of control over what thoughts the subject is willing to disclose at a given time.

[W]ith the polygraph test, the person is impeded from preventing that his physiological reactions be registered, even when he refuses to answer a question, therefore, this prevents the subject to know beforehand the contours of his renouncement [of the right to privacy], and makes the person *lose control* of what he is willing to reveal, and of the privacy that he is willing to give up.²⁵⁹

The Court's emphasis on the way the polygraph affects how we *control* the projection of our thoughts cannot be underestimated. Although lacking an explicit recognition of this issue, *Rattan* is at the crucial intersection between free speech rights and identity definition.

How we gauge the expression of personal information impacts how we project our personality (i.e., what masks we are going to wear). As previously

257. 117 D.P.R. 35 (1986).

258. *Id.* at 61-62 (emphasis added) (translation taken—but modified—from Avilés Pagán, *supra* note 174, at 375).

259. *Id.* at 62-63 (emphasis added) (translation supplied).

discussed²⁶⁰ this combination of values is particularly important for contemporary surveillance societies, and highlights the centrality of privacy as a precondition for democratic deliberation. To the extent that privacy provides an opportunity for unfettered development of ideas, being able to control our thoughts and when we express them is essential to democracy. As a consequence, from the Madman's viewpoint, the polygraph is nothing but a mask-piercing device. How plaintiff defines his personality and how he projects it to others is, in part, determined by the information he discloses or withholds. Although this Article deals primarily with decisionmaking privacy, not information privacy, *Rattan* reminds us that the Madman's identity definition interests are not only crucial for decisionmaking privacy but also for information privacy as well.

Although the Court stressed the importance of plaintiff's lack of *control* of disclosing his inner thoughts, it did not take full advantage of this opportunity to present a coherent view of this right's contours, giving other Justices the opportunity to employ a restrictive compartmentalization technique.

Justice Hernández Denton dissented in part because, in his opinion, the Court's decision "lacks manageable contours of the right to privacy."²⁶¹ Several commentators in Puerto Rico have echoed this critique.²⁶² Professor Fernández Quiñones, for instance, has said that the majority opinion "did not address the central issue of the case, that is, the right to privacy, with the scientific and doctrinal rigor that a question of this magnitude requires"²⁶³ and followed the dissenting judge's critique that privacy as construed by the majority is too general and that it lacks "manageable contours."²⁶⁴

The thrust of Hernández Denton's critique is that the Court excessively widened the protection because what may potentially infringe the right to privacy is not the polygraph *per se*, as the majority affirmed, but the kind and intrusiveness of the questions that may be asked. Therefore, it is *those* questions

260. See *supra* Part I(D)(2), text accompanying notes 111-118.

261. Arroyo v. Rattan Specialties Inc., 117 D.P.R. 35, 71-72 (1986) (Hernández Denton, J., concurring in part and dissenting in part) (translation supplied). He also stated that "[Its] *ratio decidendi* is projected too far from the controversy before [the Court and it] affects activities that would be otherwise legal, prohibiting them." *Id.*

262. See Álvarez González, *supra* note 149, at 173 nn.228, 229 (stating that the Court in *Rattan* only summarizes previous decisions and underscores that it is an important right); FERNÁNDEZ QUIÑONES, *supra* note 225.

263. FERNÁNDEZ QUIÑONES, *supra* note 225, at 251 (translation supplied).

264. *Id.* at 253. This aspect of the case regarding the *contours* of what is considered to be private is different from Serrano Geyls' critique regarding the extent to which a private individual must offer the same compelling interests as the State in a situation such as *Rattan*'s in which a private person infringes the right to privacy. Compare 2 SERRANO GEYLS, *supra* note 167, at 828 (referring to the *state action* problem); with *id.* at 1073 n. 7 (referring to the *scope* of the right). Professor Fernández Quiñones seems to confuse these two aspects. He criticizes the Court for providing no boundaries of the right, but then proceeds to criticize the problem of *state or private action* without referring to the conceptualization *Rattan* made of the right to privacy as a concept relating to the idea of *control*. FERNÁNDEZ QUIÑONES, *id.* at 255.

that should be regulated and not the technological mechanism.²⁶⁵ This reply, however, misses the point: It is the mere fact that this equipment is capable of intruding upon an individual's identity-projection process that renders its use unconstitutional. If the Court permits some questions with the polygraph, and not others, it would be choosing how the individual involuntarily releases his outward information flow and, thus, the projection of his identity. Then the government (through the Court's criteria), and not the individual, will be controlling the construction of his personality by selecting which questions can be used to pierce his masks. In this light, it is irrelevant whether the polygraph test is or not accurate;²⁶⁶ the intrusion comes from the compelled projection of an identity (accurate or not) and the consequent loss of control over what information forms that identity. In the context of that case (private employment), absent a compelling interest, others should rely on less intrusive mechanisms for obtaining relevant information to make work-related decisions.

On the other hand, Hernández Denton's efforts to define a narrower scope of the right to privacy are less principled than what he criticizes the Court's to be. Compartmentalizing the right to privacy into neat and unrelated factual boxes, he sought to distinguish *Rattan*'s facts from other previously recognized constitutional privacy contexts as follows:

[I]n this controversy nobody is limiting plaintiff's ability to make personal decisions, familial or intimate, like the termination of pregnancy . . . ; of divorcing without publicly exposing intimate life . . . ; or use contraceptives.

Also, we are not before a case where courts are called upon to intervene in the protection of the tranquility of the home . . . ; or to protect a citizen from receiving "a flood of undesirable and offensive telephone calls" . . . ; or suffering the continuous exhibition through the media of photos that constitute an unwarranted intromission into family life.²⁶⁷

Instead of inquiring how and under what principles this list of privacy cases can be related at a more general and principled level (a higher level of generality), Justice Hernández simply enumerated each and every *activity* (at a specific level) that has been recognized to conclude candidly that the asserted claim (to be free from the compulsory use of a lie detector—again, lower level) is not one of protected *activities* and thus not covered within the right. He did not state, at a more general and principled level, why the right claimed in *Rattan* had nothing to

265. *Rattan*, 117 D.P.R. at 77-78.

266. See Umpierre Chaar, Arroyo v. Rattan Specialties: *Su impacto en el desarrollo jurisprudencial del derecho a la intimidad en Puerto Rico*, 72 REV. JUR. U.P.R. 727, 734-35 (2003) (stating that Arroyo is inconsistent because it suggests that the polygraph can accurately reflect a person's impulses while, at the same time, it criticizes its unreliability); Álvarez González, *supra* note 149, at 172-73.

267. *Rattan*, 117 D.P.R. at 76 (translation supplied) (case references omitted).

do with his list. Rather, he asserted that the claimed protection was not *exactly* any one of those activities.

A similar approach was rejected by the United States Supreme Court in *Lawrence v. Texas*,²⁶⁸ while overruling *Bowers v. Hardwick*.²⁶⁹ In *Bowers*, the Court upheld Georgia's criminal sodomy statute, refusing to recognize "homosexual activity" as a protected privacy interest. *Bowers* declined to include this "activity" within any group of activities already recognized as private by previous case law because no resemblance between them was found. In this sense, the Court stated that "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity, on the other, has been demonstrated."²⁷⁰

Compartmentalizing the right to privacy into neat and self-contained spheres (family, marriage, and procreation), takes from *privacy* any cognizable principle that could be made applicable to other situations and that could explain exactly why these activities, and not others, are protected.²⁷¹ As Rubenfeld stated about *Bowers*'s precedent compartmentalization, "By identifying three separate applications ungrounded by any unifying principle, the majority effectively severed the roots of the privacy doctrine, leaving only the branches, which will presumably in short order dry up and wither away."²⁷² And as Conkle also affirmed, "[I]f *Bowers* were our only example, it would be difficult to defend the ability of the judiciary to engage in a process of reasoned decision-making."²⁷³ An approach that follows this technique, which Hernández Denton employed at an even more precise level of specificity is, in short, what the dissenting judge charged the *Rattan* majority to be: unprincipled.²⁷⁴

In *Lawrence v. Texas*, the Court explicitly rejected *Bowers*'s methodological strategy in the following terms:

To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that,

268. *Lawrence v. Texas*, 539 U.S. 558 (2003).

269. 478 U.S. 186 (1986).

270. *Bowers*, 478 U.S. at 191.

271. See Rubenfeld, *supra* note 27, at 748-49 (1989); Daniel O. Conkle, *The Second Death of Substantive Due Process*, 62 IND. L. J. 215, 242 (1987).

272. Rubenfeld, *supra* note 27, at 749.

273. Conkle, *supra* note 271, at 242.

274. Rubenfeld, *supra* note 27, at 748.

whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.²⁷⁵

Less than a year after *Rattan*, in *López Vivies v. Policía de Puerto Rico*,²⁷⁶ Justice Naveira de Rodón developed again the *control* theory in a concurring opinion, but this time extending it to both informational and decisionmaking privacy with more precise and concrete boundaries. *López Vives* is primarily a case about the individual right to access personal information in the government's hands, as guaranteed by the Constitution of Puerto Rico. A police officer who was fired sought an administrative review of that decision. The adverse decision was based on a *confidential report* that was not made available by the government to the employee. The Supreme Court ordered the report to be made available to the individual on procedural due process grounds. Justice Naveira de Rodón concurred expressing that, because the case implicated *personal information*, the basis for the decision should have been the right to privacy, in its informational mode.²⁷⁷ But most importantly for our purposes, she sought to extend *Rattan*'s control thesis in explicit recognition of the constitutional personal interest in self-definition:

An indispensable element of the right to privacy—in both its modalities—is the *control* that must be recognized and guaranteed to the citizen regarding the different values immersed in the right: *values such as the formation of an identity, private and family life and the autonomy in making important decisions.*²⁷⁸

Under this model, there are some values associated with privacy that constitutionally should remain under individual control, and thus protected from state or individual infringement. Presumably, under this theory, the Court would have had to refine the boundaries of those values, and the degree of control needed for their protection. One such value is the Madman's plight, "the formation of an identity." Given the current conceptual drought with which the right to privacy is approached in Puerto Rico, it is difficult to understand why the Court has not even tried to grapple with this theory—either rejecting it, adopting it fully or just starting anew. Naveira de Rodon's concurrence is certainly insightful but has gone almost completely unnoticed,²⁷⁹ although her conclusion

275. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

276. 118 D.P.R. 219 (1987).

277. *See supra* note 232.

278. *López Vives*, 118 D.P.R. at 244 (Naviera de Rodón concurring) (translation supplied) (emphasis added).

279. Recently, in the context of privacy's appropriation of image component, the Court stated that "self-image is a fundamental attribute with which a person is individualizes in society; that is, it is part of personal identity." *López Tristani v. Maldonado Carrero*, 2006 TSPR 143 , 2006 WL 2635837 (P.R.) at *5. However, the result of the case was contrary to the interest in identity definition, for in that case the

that the right to privacy entitles an individual to verify personal information held by the government has been adopted by the Court on several occasions.²⁸⁰

b. *Compartmentalizing Marriage and Adoption*: *Figueroa Ferrer and Pérez Vega*. The second set of cases that illustrate the lack of effort to attain principled cohesiveness among the privacy cases is from the area of privacy dealing with individual and family autonomy, in particular the right to marry. I will come back to these cases later in this Article, limiting the present discussion to the point being made here.

In *Figueroa Ferrer v. E.L.A.*²⁸¹ the Court struck down part of Article 97 of the Puerto Rico Civil Code, which states that:

A divorce cannot be granted when the ground upon which it is sought be the consequence of an agreement or understanding between the husband and wife or an acquiescence of either to secure it.²⁸²

Before *Figueroa Ferrer*, one could only obtain a divorce in Puerto Rico through one of eight fault-based causes set in the Civil Code,²⁸³ or a non-fault divorce mechanism if the married couple had been separated for a period of two years.²⁸⁴ This situation forced the married couple either to remain married but separated for two years before becoming eligible for divorce or to stage in court a bogus fault-based cause in order to make it appear adversarial. The Court in *Figueroa Ferrer* found this situation particularly offensive to the spouses' dignity and privacy. It therefore held that the parties' privacy was inadequately safeguarded by the statutory no-fault separation alternative and that they had the right to immediately seek a no-fault divorce by mutual consent. In short, after *Figueroa Ferrer*, the right to privacy in Puerto Rico includes the right to end a marital relationship by mutual agreement as a consequence of their autonomous decision and, also, under the rubric of informational privacy, the right not to disclose intimacies in Court.

Privacy in *Figueroa Ferrer* is conceived as a limiting principle against State

individual was not able to obtain control of personal information (a video with embarrassing images) that was consigned in Court even when judicial proceedings had been completed. The control over the projection of her identity was, thus, compromised by the Supreme Court's ruling. Furthermore, this holding is utterly inconsistent with *Pueblo v. Torres Albertorio*, 115 DPR 128 (1984), where the Court recognized a privacy right to obtain original criminal record upon acquittal.

280. *Torres Ramos v. Policía*, 143 DPR 783, 798 (1997); *Pueblo v. Torres Albertorio*, 115 D.P.R. 128 (1984) (recognizing a privacy right to obtain original criminal record upon acquittal).

281. 107 D.P.R. 250 (1978).

282. P.R. CIV. CODE, art. 97, 31 L.P.R.A. § 331 (official translation).

283. P.R. CIV. CODE, art. 96(1)-(8), 31 L.P.R.A. § 321(1)-(8).

284. P.R. CIV. CODE, art. 96(9), 31 L.P.R.A. § 321(9) ("The causes for divorce are: . . . (9) Separation of both spouses for an uninterrupted period of more than two years. After the separation for the expressed period of time of more than two years has been satisfactorily proven, neither of the spouses shall be considered to be guilty nor innocent when the judgment is rendered.").

overreaching. Therefore, the Court found an “eminently personal area in which the human being has a right to the least possible intervention by the State and in which [the Court] should irrupt only when it is justified by the general interest.”²⁸⁵ But more specifically, *Figueroa Ferrer* held that the right to privacy in Puerto Rico includes not only the right to marry, as it has been recognized in the Supreme Court of the United States,²⁸⁶ but also—in the expansive tradition that usually characterizes the Court’s approach with this right—the ability to dissolve the marital association at the will of the spouses, *i.e.* by mutual consent.

A more recent and related case, *Pérez Vega v. Procurador*,²⁸⁷ must be contrasted to *Figueroa Ferrer*’s expansive approach to show the Court’s lack of effort to come up with more generalized principles. In *Pérez Vega*, the Court rejected an unmarried couple’s application to adopt a minor whom they had in their legal custody since she was twenty days old. In the opinion of the Solicitor of Family Relations, grating the application would have been in the best interest of the child. The adoption was nonetheless contrary to law. The law in Puerto Rico requires all joint adopters to be married. Thus, joint adoptions by unmarried couples are prohibited although one member of a *de facto* union is legally able to adopt a child individually.²⁸⁸ The claimants challenged the validity of the statute asserting that, among other things, it established a classification between married and unmarried persons that infringed “their fundamental right to privacy as concubines that did not wish to legalize their relationship through marriage.”²⁸⁹ The Court simplistically dismissed this claim with a more awkward version of the compartmentalizing technique than the one employed by the U.S. Supreme Court in *Bowers* and by Justice Hernández Denton in *Rattan*:

It is common knowledge that the right to privacy protects the decision of those couples that *wish to marry* because the *freedom to marry* has been historically recognized as a vital personal right, essential for the search of happiness by free persons.²⁹⁰

This description of the right to privacy includes the right to marry, but it says nothing about the right *not to marry* or any available broader notion. And as if

285. *Figueroa Ferrer*, 107 D.P.R. at 275 citing *Rosario v. Galarza*, 83 D.P.R. 167, 174 (1961); *see P.R. Tel. Co. v. Martínez*, 114 D.P.R. 328, 339 (1983) (the right to privacy includes “the decision of a married couple to terminate their marriage by mutual consent”); *Sostre Lacot v. Echlin*, 126 D.P.R. 781, 795 (1990); *cf. López Vives v. Policía*, 118 D.P.R. 219, 247 (1987) (Naviera de Rodón, concurring) (conceptualizing *Figueroa Ferrer* as a mixed case that combines both informational and decisional privacy).

286. *Loving v. Virginia*, 388 U.S. 1 (1967); *Zablocki v. Redhail*, 434 U.S. 374 (1978).

287. 148 D.P.R. 201 (1999).

288. Article 133 of the Civil Code, 31 L.P.R.A. § 534, states that: “No one may be adopted by more than one person, except when the adopters are married to each other, in which case they shall adopt jointly.”

289. *Pérez Vega v. Procurador*, 148 D.P.R. 201, 217 (1999).

290. *Id.* at 218. (*emphasis in original*).

Figueroa Ferrer's holding did not even exist, although it was cited for the proposition that marriage is a fundamental right, the Court concluded even more strikingly with the following passage rejecting the asserted privacy claim:

The present case considerably differs from the previous situation . . . [A]ppellants do not desire to be in a marital relation to formalize their union. They wish to remain in a *de facto* union or *more uxorio* relation. At the outset, they are missing one of the essential elements that confer the decision to marry its high esteem within the hierarchy of constitutional rights. That is, wanting to *enter* a union that reaches the rank of being a legal institution because of the juridical rights and duties that fall from it.²⁹¹

In other words, the Court in *Pérez Vega* held that the right to *marry* is covered by the right to privacy, but the decision to *remain unmarried* is not constitutionally protected, and because the applicants were not claiming the right to enter into the marital relation they had no privacy claim at their disposal. It meant nothing for the Court that *Figueroa Ferrer* recognized a constitutional right, not only to marry, but also to actively *dissolve* it at the spouses' mere will. Given *Figueroa Ferrer's* holding, *a fortiori*, the decision *not to marry* or, in the Court's words, the decision not "to be in a marital relation to formalize their union," should be recognized with equal status as the decision to marry or to get divorced. Furthermore, as it will be discussed at a later point, the Court should have also recognized the constitutional right of the petitioners not only to remain unmarried, but also to enter into an informal intimate association.²⁹²

The importance of this decision cannot be underestimated, especially in methodological terms. The Court merely selected *marriage*, and the decision to enter into it, as the sole protected activity, regardless of any broader principle that this and the *Figueroa Ferrer* decision may stand for. With this "radical reductionism,"²⁹³ the Court refused to give the particular privacy protected interests any broader significance and concomitantly declined to define privacy's contours in a principled manner.

The right to get married is not alone in the constitutional universe. It is a fundamental constitutional right because it is associated with broader notions of family privacy, autonomy or marital choice²⁹⁴ or other claims such as the right to procreate,²⁹⁵ to conduct one's intimate affairs without state intrusion²⁹⁶ or, more broadly, the right to give shape and form close and meaningful relationships with

291. *Id.* at 219. (emphasis added).

292. See text accompanying *infra* Part III(C), text accompanying note 428, *et seq.*

293. TRIBE & DORF, *supra* note 256, at 79.

294. TRIBE & DORF, *supra* note 256, at 50.

295. *Zablocki v. Redhail*, 434 U.S. 374, 286 (1978) ("[I]f [the] right to procreate means anything at all, it must imply some right to enter the only relationship in which the State . . . allows sexual relations legally to take place.").

loved ones.²⁹⁷ Perhaps the textual constitutional protection phrased in terms of "family life" could have provided a broader guide for addressing the asserted claim in *Pérez Vega*. Also, the Court could have even drawn a narrower principle by merely recognizing that the right to marry entails the decision not to marry.²⁹⁸ But to the extent that these and other principled alternatives were rejected, the Court fixed the boundaries of privacy to only those specific activities already recognized as *private* as if they exhausted the entire range of possibilities. As Tribe and Dorf put it for a different context: "The majority pigeonholed the earlier cases to ensure that no right to privacy broad enough to encompass [plaintiff's] behavior emerge."²⁹⁹ Moreover, the decades-old doctrine that the right to privacy in Puerto Rico has a broader protection than its U.S. counterpart was completely ignored. In fact, it was not even mentioned.³⁰⁰

How the Court frames the relevant privacy interests implicated by these cases is separate from the question whether compelling governmental interests outweigh them or whether the State could legitimately afford benefits to married people while denying them to members of a de facto union. This question will be considered at a later point.³⁰¹

c. *Human Dignity as a Backup Singer: The Case of Sex-Change Formal Recognition*). Although the Puerto Rico Supreme Court has embraced the Constitution's protection of human dignity, it appears not to consider the human dignity protection to be a self-standing provision; indeed, the Court has rarely, if ever, used human dignity as an independent protection. Rather, it has been generally used as a background principle reinforcing other constitutional rights

296. Figueroa Ferrer v. E.L.A., 107 D.P.R. 250, 275 (1978) (stating that the marital relation is an "eminently personal area in which the human being has a right to the least possible intervention by the State.").

297. Lawrence v. Texas, 539 U.S. 558 (2003). Karst, *supra* note 102; SCHOEMAN, *supra* note 104, at 106-07.

298. See José Julián Álvarez González, *Derecho Constitucional*, 69 REV. JUR. U.P.R. 419, 444 n.96 (2000). Cf. United States v. United Foods, 533 U.S. 405 (2001); Wooley v. Maynard, 430 U.S. 705 (1977); West Virginia v. Barnette, 319 U.S. 624 (1943) (the right to speak entails the right not to speak).

299. TRIBE & DORF, *supra* note 256, at 75.

300. For the list of cases mentioning and applying this doctrine since 1975, see *supra* note 243.

301. See further discussion *infra* Part III(C). The United States Supreme Court has held that not "every state regulation which relates in any way to the incidents of or prerequisites of marriage must be subjected to rigorous scrutiny. [Reasonable] regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed." Zablocki v. Redhail, 434 U.S. 374, 386 (1978). See also Califano v. Jobst, 434 U.S. 47 (1977) (upholding a Social Security scheme that denied disabled children's benefits if they married a non-beneficiary of the program, but retained the benefits upon marriage to a beneficiary). See also Lofton v. Kearney, 157 F. Supp 1372 (S.D. Fla. 2001) (homosexual foster parents or guardians have no recognized liberty interest in adopting children guaranteed by the Due Process Clause of the Fourteenth Amendment); Note, *Constitutional Law—Equal Protection and Due Process—Statutory Classifications Based on Sexuality—Florida District Court Upholds the Constitutionality of Statute that Prohibits Homosexuals From Adopting—Lofton v. Kearney, No. 99-10058, 2001 U.S. Dist. Lexis 13425 (S. Fla. Aug. 30, 2001)*, 115 HARV. L. REV. 1259 (2002) [hereinafter Note, *Statutory Classifications Based on Sexuality*].

such as the right to privacy and specific anti-discrimination provisions.³⁰² The reason seems to be an exaggerated insistence on this nested or “subsumed” relationship that each particular right has with this broader concept. When dealing with privacy issues it is almost customary for the Court to limit its reference to the human dignity provision by repeating the statement made in the Constitutional Convention that the right to privacy “constitutes a principle that complements the concept of human dignity.”³⁰³ As a result, the Court has used human dignity as a mere adjunct, denying it autonomous force and applying directly each of the protected rights.

Some noteworthy exceptions in which particular judges have asserted the right to human dignity independently deal with cases of a newer vintage in which plaintiffs have forwarded untraditional claims under the privacy-plus-dignity combination. I have found two such cases. One deals with a claim for the legal recognition of the sexual category in the birth certificate after a male-to-female (MTF) sex change operation.³⁰⁴ In the other case, relatives of a deceased person claimed the right to be asked for consent before the government ablated the deceased’s corneas for human transplant, when no previous consent was given by the deceased when living.³⁰⁵ In those few exceptions several judges, not the

302. See cases cited at *supra* note 208. See also, e.g., *Ocasio v. Díaz*, 88 D.P.R. 676, 726-28 (1963) (human dignity-plus-discrimination based on birth); *García Santiago v. Acosta*, 104 D.P.R. 321 (1975) (same); *Zachry International v. Tribunal*, 104 D.P.R. 267, 281 (1975) (dignity-plus-sex based discrimination).

Dignity is often combined conceptually with *honor* and *reputation*, especially in the libel and defamation context. *Giménez Álvarez v. Silén*, 131 D.P.R. 91 (1992). In defamation and libel actions it is common for the court to refer to the dignity, honor, and reputation of the affected claimant. In those particular cases, dignity seems to indicate a particular protection against those personal affronts as protected by (1) Puerto Rico’s libel and slander act of 1902, 32 L.P.R.A. §§ 3141 *et seq.*; (2) article 1802 of the Civil Code, 31 L.P.R.A. § 5141 (providing for a cause of action to recover for damages caused by fault or negligence) and; (3) article II, section 8, of the Constitution which, as its been discussed, protects against abusive attacks on honor, reputation and private or family life. See, e.g., *González v. Ramírez Cuerda*, 88 D.P.R. 125, 133 (1963); *Cortés Portalatín v. Hau*, 103 D.P.R. 734, 738 (1975); *Giménez Álvarez v. Silén*, 131 D.P.R. 91, 97 (1992); *Porto v. Bentley*, 132 D.P.R. 331, 343 (1992).

303. See 4 DIARIO DE SESIONES, *supra* note 173. See *Soc. de Gananciales v. Royal Bank de P.R.*, 145 D.P.R. 178, 201 n. 8 (1998); *Vocero v. E.L.A.*, 131 D.P.R. 356, n. 39 (1992); *Sostre Lacot v. Echlin*, 126 D.P.R. 781, 795 (1990) (Negrón García, J., dissenting); *Pueblo v. Hernández Colón*, 118 D.P.R. 891, 904 (1987); *Pueblo v. Martínez Martí*, 115 D.P.R. 832, 833 (1984) (Trías Monge, concurring); *Figueroa Ferrer v. E.L.A.*, 107 D.P.R. 250, 259 (1978); *E.L.A. v. Hermandad de Empleados*, 104 D.P.R. 436, 441 (1975).

304. *Ex parte Alexandra M. Andino Torres*, 151 D.P.R. 794 (2000) (judgment without Court Opinion).

305. In *Sucn. Concepción v. Banco de Ojos*, 153 D.P.R. 488 (2001), a plurality of the Court, without agreeing on one rationale, determined that the relatives of a deceased person did not have a cause of action against the government for conducting the ablation of the deceased’s corneas without their authorization. One judge, Associate Judge Fuster Berlingeri, dissented from the Majority holding deeming the lack of consent from the deceased’s closest relatives as a violation of their constitutional guarantee of protection against attacks to their “private and family life”. *Id.* at 518-19. However, Associate Judge Hernández Denton dissented separately because, in his judgment, the “Anatomic Donations Act, as written, is unconstitutional for it violates the *dignity* of the deceased’s relatives.” *Id.* at 490 (emphasis added). Although the Judge only made this simple statement without further explanation, it is important to note that his human dignity stance seems to be purposely different from Fuster Berlingeri’s privacy claim. For an analysis on how presumed-consent organ donation statutes may violate

Court, did refer to the concept of human dignity as an independent constitutional protection. The best example is *Ex parte Andino Torres*,³⁰⁶ a case that also reflects at least one judge's effort to limit constitutional rights by way of compartmentalization.

In *Andino Torres*, a plurality of the Supreme Court permitted the change of sexual classification in the birth certificate of a MTF post-operative transsexual. In a concurring opinion, Justice Negrón García (joined by Justices Hernández Denton and Fuster Berlingeri) based his judgment primarily on human dignity as the protection of the plaintiff's ability to shape her personality, and only *secondarily* on privacy. In what is perhaps the most eloquent articulation of the human dignity principle and its independent application to a specific situation by a Puerto Rico Supreme Court Justice, Negrón García stated:

Human dignity covers the most intimate aspects of one's personality. It is a *sine qua non* requisite for self respect, the most precious entitlement of the moral person. If, for reasons that escape conventional understanding, a human being seeks to integrate her human psyche with a physical aspect that she considers repugnant—through a chemical and surgical process that is difficult and traumatic, but absolutely legal—to deny recognition to the resulting social and physical reality, would be a lack of understanding to her condition; a lack of respect to her decision and a lack of solidarity with her suffering.³⁰⁷

In any case, in light of the Puerto Rican constitutional arrangement and history and given the primacy afforded to human dignity in the Constitution, there is no reason why this right should not be used more vigorously as a self-sufficient protection while simultaneously functioning as a propelling force of other individual protections in the Bill of Rights. Limiting the human dignity principle solely to the reinforcement of other rights, conceptually restricts the range of activities protected by the Bill of Rights and may unnecessarily cabin possible claims within those individual protections.

The *Andino Torres* case presents a good illustration of this latter possibility through compartmentalization. One of the dissenters, Justice Rebollo López, concluded that *privacy* "does not constitute a constitutional right to have a 'sex change' recognized for all social and juridical purposes,"³⁰⁸ and that the claimant had not "demonstrated any relation between, on one hand, the alleged fundamental right she claims and, on the other, family relations, matrimony, procreation nor

privacy and liberty interests recognized under the U.S. Constitution, see Maryellen Liddy, *The "New Body Snatchers": Analyzing the Effect of Presumed Consent Organ Donation Laws on Privacy, Autonomy, and Liberty*, 28 FORDHAM URB. L.J. 815 (2001).

306. *Ex parte Alexandra M. Andino Torres*, 151 D.P.R. 794 (2000).

307. *Id.* at 807.

308. *Id.* at 825 (Rebollo López, J., dissenting).

the sanctity and tranquility of the home.”³⁰⁹ These remarks are an eloquent example of how the compartmentalization technique is used to deny human rights recognition. Also, this passage reflects the limitations presented by the current approach to human dignity. If independent human dignity jurisprudence had existed in Puerto Rico, and if such right could be asserted independently at a higher level of generality, it would have been impossible for Justice Rebollo López to simplistically reject the asserted claim by referring to the particular *activities* already recognized by the constitutional concept of privacy. The dissenter would have had to grapple with the protection of dignity as pressed by Justice Negrón García, a feat he did not feel compelled to achieve.

Case law has so compartmentalized the substantive scope of privacy to its restricted and segmented realms that a few years later in *Ex parte Alexis Delgado Hernández*³¹⁰ the Court in full denied the same claim by another post-operative male-to-female transsexual. This time, however, it did not even recognize the existence of a privacy or dignity constitutional claim and simply rejected plaintiff’s case upon statutory analysis over the objection of several Justices.³¹¹

In this sense, this technique of compartmentalizing previously recognized activities as private, and refusing to draw from them *manageable contours* is a dangerous practice that, in the end, impedes the development of the right to privacy; freezes the recognition of different and alternative privacy claims; and serves only the most conservative mindsets. Furthermore, it tends to limit the growth of the protection favoring the *status quo* and, most importantly, contentiously confronts the expansive mandate that the Constitution imposes on the construction of the Bill of Rights.

With these problems in mind, how should the Court adopt and construct manageable boundaries of the right to privacy while maintaining the expansive approach that the Constitutional text and history demand?

C. RECOMMENDED METHODOLOGICAL AND SUBSTANTIVE APPROACH

From the discussion so far, we can identify three general elements that must be taken into consideration when drafting the contours of privacy in Puerto Rico. These are: (i) The starting point for approaching privacy must be the Puerto Rican Constitution’s text and history. This context should define privacy’s substantive contours and the Court’s methodological approach. (ii) Although general principles can and should be identified, it must be recognized that privacy is a multidimensional concept. Hence, any effort to define its contours must not imprison the right into one particular theory and must consider the doctrinal context in which a claim is made (*i.e.*, whether it is decisionmaking or information privacy, search and seizure law, tort law, etc). (iii) Any effort to draw

309. *Id.*

310. 2005 TSPR 95, 2005 WL 1593435 (P.R.).

311. See my comment on this case at Hiram A. Meléndez Juarbe, *Derecho Constitucional*, 75 REV. JUR. U.P.R. 29, 62 (2006).

substantive contours must frame both the right to privacy and the asserted claims at an adequate level of generality avoiding compartmentalization.

1. Adequate Consideration of the Constitution's Text and History

As it has been reiterated, an important aspect in delimiting the scope of privacy in Puerto Rico is the recognition that the constitutional text and history demand that the right to privacy be considered with an expansive attitude. Also, as the Puerto Rican constitutional history shows, the Court must not be complacent with the contours of the right as described by the U.S. Supreme Court. Since the Constitution was enacted with the express purpose of encompassing its own understanding of the constitutional provisions, the Island's Supreme Court must conceive the right to privacy as part of the Puerto Rican experience. *Thus, the adherence to or departure from the minimum federal guarantees should be explained on independent grounds, rather than merely mimicking United States Supreme Court case law and thereby exhausting other possibilities.*

Although Puerto Rico is an unincorporated territory, Justice Brennan's words concerning the crucial role that state constitutional guarantees ought to serve in the protection of individual liberties in a federal system are highly relevant:

[S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.³¹²

Many state constitutions guarantee a wider protection of privacy than what the U.S. Supreme Court case law secures.³¹³ There are, however, many ways in which a state, or Puerto Rico, could approach its relationship with the U.S. Constitution. Under one view, the state constitutional provision is considered to have the same meaning as its U.S. counterpart; thus, the federal protection is the only reference in the interpretation of state constitutional provisions.³¹⁴ At the other end of the spectrum, courts could address local constitutional protections as a first source when addressing a claim with a parallel federal protection. In this sense, claims under the federal guarantees would be unobserved while the state provision would be given preeminent consideration, so long as this does not interfere with both the constitutional floors and ceilings imposed by the U.S.

312. Brennan, *supra* note 179, at 491.

313. Ken Gormely, *One Hundred Years of Privacy*, 1992 Wis. L. Rev. 1335, 1422 (1992).

314. Kevin Francis O'Neill, 1 *The Road Not Taken: State Constitutions as an Alternative Source Of Protection For Reproductive Rights*, 11 N.Y.L. SCH. J. HUM. RTS. 1, 12 (1993); Mark Silverstein, *Privacy Rights in State Constitutions: Models for Illinois?*, 1989 U. ILL. L. REV. 215, 217 (1989).

Constitution.³¹⁵ Under a third view, the federal protections could be considered as the first point of departure, but not an exclusive source. A Court using this approach would first exhaust the federal provision, and if that does not provide the relief sought, then the state constitutional provision would be addressed.³¹⁶

The notion that state constitutions are mere reflections of federal protections is widely rejected, for undoubtedly the states and territories do have an important place in the defense and protection of individual rights.³¹⁷ This is particularly true in the case of Puerto Rico, where the distinct history of the Bill of Rights, as well as its text and structure, specifically direct courts to seek an independent meaning to the right to privacy. To subsume Puerto Rico's privacy protection within federal guidelines without further consideration would conflict with the constitutional mandate to avoid non-reflexive juridical subordination in matters of individual rights and would be a clear abdication by the Court of its expected responsibilities. Furthermore, to not seek a broader protection would equally run afoul of the clear constitutional direction which the framers entrusted the Supreme Court to follow; for privacy was particularly conceived as specially related to human dignity and "about personal inviolability in its most complete and ample form."³¹⁸

Therefore, when differing from the federal minimum provisions, the Court in Puerto Rico should consider whether to simply expand and tinker with the federal constitutional substantive scope,³¹⁹ or whether to embark in a self-reliant definitional process of the protection's contours.³²⁰ This decision, as commenta-

315. O'Neill, *supra* note 314, at 13; Silverstein, *supra* note 314.

316. O'Neill, *supra* note 314; Silverstein, *supra* note 314. These alternatives explore the role of state constitutions in protecting individual rights within the federal system. They determine whether state decisions are reviewable by the Supreme Court depending on whether they are based on adequate and independent state grounds. See Note, *supra* note 249, at 1328-29. On the doctrine of adequate and independent state grounds see 1 TRIBE, *supra* note 20, at § 3-24, 505-12 (2000).

317. Note, *supra* note 249, at 1356; O'Neill, *supra* note 314, at 12-13; Silverstein, *supra* note 314, at 288; Brennan, *supra* note 179; Joyce A. McCray Pearson, *The Federal and State Bills of Rights: A Historical Look at the Relationship Between America's Documents of Individual Freedom*, 36 How. L. J. 43, 71-72 (1993).

318. See 4 DIARIO DE SESIONES, *supra* note 173.

319. This has been called the "reactive approach." The reactive approach allows the state court to tinker with the federal floors, to second-guess or anticipate the evolution of federal constitutional rights. Without incurring the burden of constructing a full-blown state theory of rights, it provides an additional layer of protection between individual rights and the oppressive potential of the state. Reactive reasoning is most common, and most appropriate, when the right asserted lies only slightly beyond the boundaries of federal protection. The reactive court focuses its attention on federal precedent, often a recent Supreme Court case denying federal protection in an analogous situation, and arrives at its result by responding to the federal reasoning, often by attacking it frontally or by articulating state-specific or institutional reasons for divergence from the federal result. Note, *supra* note 249, at 1363-64.

320. This "self-reliant approach" has been described as follows:

The self-reliant approach, on the other hand, focuses on the state constitution as an independent source of rights to be elaborated on its own terms. Courts using this approach examine the full panoply of considerations appropriate to judicial interpretation of fundamental law. If federal reasoning is considered at all, it is used not as a theme to be embellished, but merely as one

tors have stated, should be a pragmatic decision that ought to be addressed by answering the following question: "How useful will the available federal doctrine be as a base on which to build an alternative state doctrine?"³²¹ In this sense, in situations where distinct features of Puerto Rico's constitutional structure cannot be neatly accommodated within the reasoning of federal standards, a self-reliant approach is clearly warranted.³²²

Given the particular history and text of the Constitution and of the right to privacy in Puerto Rico, the Court should follow the approach that posits initial reliance on the Commonwealth's constitutional text. Because the application of federal constitutional guarantees to the states and Puerto Rico necessarily frames local courts' scope of action,³²³ some guidance must be sought from the federal Constitution, but only to the extent needed to comply with its minimum. Thus, *while respecting federal parameters, the courts in Puerto Rico should use independent substantive criteria when addressing the right to privacy.*

An independent analysis of the right to privacy in Puerto Rico that gives due weight to the Constitution and its historical background produces at least three specific conclusions.

- (i) As argued, the Puerto Rico Supreme Court should strive for an independent analysis of this right, regardless of the logic of U.S. constitutional protection. To the extent that it does not conflict with U.S. constitutional rights, the Court's reasoning and methodology can and should be independent. This means, specifically, that it should *articulate and explain* privacy's substantive parameters, whether expanding or contracting them. With this in mind, the Puerto Rico Supreme Court could, for instance, take advantage of the direct influence of international human rights instruments when construing the scope of the right to privacy, by considering interpretations given by international tribunals of privacy and human dignity clauses in historically germane instruments.³²⁴

instructive source of reasoning to be treated on a par with reasoning from other states and scholarly commentary. Although relatively rare, self-reliant decisionmaking is most common when a diversity of state-specific factors combine in a particular area to suggest that analogies between state and federal law are highly attenuated or when the state court has moved into an area in which federal parallels are unavailable.

Note, *supra* note 249, at 1364.

321. *Id.* at 1363.

322. *Id.* at 1366.

323. *Id.* at 1338. For the application of federal individual guarantees to Puerto Rico through the doctrine of territorial incorporation, see *supra* notes 160, 178 and accompanying text.

324. See e.g., *Ex Parte Alexis Delgado Hernández*, res el 30 de juio de 2005, 2005 TSPR 95, 2005 WL 1593435 (P.R.) at *24-27 (Fiol Matta J., dissenting) (In a sex-change recognition case, a dissenting judge relied on cases interpreting Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) which protects the right to the respect for private and family life, i.e. *Goodwin v. United Kingdom*, 35 Eur. Ct. H.R. 18 (2002)).

- (ii) Given the Constitution's emphasis on human dignity and privacy as highly important rights, the analytical point of departure must be an *expansive reading of the Constitutional text* and not the minimalist approach demonstrated in some decisionmaking privacy cases such as *Pueblo v. Duarte* (abortion), *Pérez Vega* (constitutional status of *de facto* union) and *In re Alexis Delgado Hernández* (sex-change recognition).
- (iii) On a substantive note, because the concept of human dignity in Puerto Rico has a special significance in the architecture of the Bill of Rights, the Court must give due consideration to that substantive right both independently and in its relation to privacy. Particularly it must consider how an independent reading of human dignity may color constitutional privacy claims as assertions of self-definitional interests.

2. Privacy's Multidimensional Character

In its effort to delimit a principled scope of privacy, the Court must realize that because of the fluid character of the notion of privacy, any effort to encompass this protection within a single rigid theory runs the risk of excluding important and novel claims otherwise falling within a more flexible, inclusive, and pragmatic notion. Thus, efforts made to define some manageable contours in a principled fashion should be capable of responding to the demands that time always imposes on law, while addressing particular areas of privacy instead of aiming at the entire panoply of interests under its rubric in a totalizing fashion.

As discussed earlier, several values surround privacy claims: free speech, democracy, anonymity, freedom of association, state overreaching, identity definition, etc. In many ways, different privacy claims and values may be related and, as I have argued, in many cases they have in common the Madman's point of

The International Covenant on Civil and Political Rights Human Rights Committee ("ICCPR Committee"), applying Article 17 of the ICCPR (similar to the Universal Declaration of Human Rights which, in turn, influenced the Puerto Rican Constitution), held in *Toonen v. Australia* that Australia's criminal statute prohibiting consensual same-sex sexual relations was unreasonable and, thus, invalid. *Toonen v. Australia*, U.N. Hum. Rts. Comm., No. 488, U.N. Doc. CCPR/c/50/D/488/1992 (1994). Similarly, in *Norris v. Ireland* the European Court of Human Rights held that an Irish law that prohibited consensual homosexual activity, violated Article 8 of the ECHR. *Norris v. Ireland*, 13 Eur. H.R. Rep. 186 (1991). See James D. Wilets, *Using International Law to Vindicate the Civil Rights of Gays and Lesbians in United States Courts*, 27 COLUM. HUM. RTS. L. REV. 33 (1995); Mark E. Wojcik, *Using International Human Rights Law to Advance Queer Rights: A Case Study for the American Declaration of the Rights and Duties of Man*, 55 OHIO ST. L. J. 649 (1994). Cf. Dávila Caballero, *supra* note 251, at 1225 n.106 (arguing that the Puerto Rican Constitution's broader scope and specific reference to international instruments is sufficient to strike down Puerto Rico's sodomy statute). But see Wayne Morgan, *Queering International Human Rights*, in *SEXUALITY IN THE LEGAL AREA* 208 (Carl F. Stychin & Didi Herman eds., 2000) (arguing that cases like *Toonen* in fact "strengthen discourses of heteronormativity which construct sexual differences as 'other,'" primarily because the case largely adopts a discourse of tolerance and neutrality, rather than of positive valuation of homosexuality. "The very notion of 'tolerance' implies subordination: you do not 'tolerate' something which is good (you celebrate it), you only 'tolerate' things you would rather didn't exist. 'Tolerance' is thus a practice of oppression." *Id.* at 220.).

view: either by way of decisionmaking or information control, identity definition has significant value.

However, it is important to recognize that several interests accompany different privacy claims. This multifaceted perspective permits a more contextual, albeit principled, approach.

With this in mind, Wagner DeCew proposes the development of a presumption mechanism, what she calls a *practical strategy*, "in favor of the need to protect privacy in the types of cases or contexts identified as those where privacy is at stake."³²⁵ But because each type of interest is different, although related, they all have their own particular reasons for existence, which can be taken into account in their adjudication, instead of one general rule "describing when intrusion by others is overbearing or inappropriate."³²⁶ It is, in short, a question of contextual emphasis: Although identity definition is an important value in many privacy cases, those interests that are more relevant for each privacy claim must be especially taken into consideration in their adjudication. As argued throughout this Article, in the context of decisionmaking privacy, in its relation to human dignity, identity definition is a paramount principle.

This approach recognizes the living nature of our Constitution. The words in the Constitution, stated Justice Oliver Wendell Holmes in 1920, are "a constituent act,"³²⁷ and as such, "we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters."³²⁸ Thus, "[t]he case before us," he stated, "must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."³²⁹ Recognizing this approach, the Puerto Rican Constitution included, as mentioned earlier, a provision that forbids restrictive interpretations of the Bill of Rights.³³⁰ With this provision it recognized that "[n]obody can foresee the totality of problems that the future holds, nor how future interpreters of the constitutional text should deal with them."³³¹ These words are, no doubt, applicable to the right of privacy.

As retired Justice Negrón García once stated while considering some of privacy's definitional conundrums:³³²

325. WAGNER DECEW, *supra* note 76, at 74.

326. *Id.* at 80.

327. Missouri v. Holland, 252 U.S. 416, 433 (1920).

328. *Id.*

329. *Id.*

330. P.R. CONST. art. II, § 19.

331. Report of the Bill of Rights Committee to the Constitutional Convention, 4 DIARIO DE SESIONES, *supra* note 185, at 2576.

332. Justice Negrón García considered that:

[I]n Spain it has been said that the right to privacy doctrine is "fragmented, antiquated and incomplete"; in the United States, that "[a]t the heart of the right to privacy, there has always been a conceptual vacuum"; and in Puerto Rico we have been told that "[t]here is, by the Court, not even an effort to find a unifying theory of this right for its application to the most diverse circumstances."

[The right to privacy] is a generic, elusive and difficult to apprehend concept. Its nature, in many cases, is abstract, and the fact that its full recognition is recent, has represented problems for both its claim and in the adjudication of controversies *[T]he right to privacy cannot be a closed category, rather it must be sufficiently dilated so that it could be “claimed under any new and unexpected developments in costumes or technology.”*³³³

Or as the Supreme Court of Puerto Rico once famously put it also referring to privacy:

The Constitution’s vitality rests on its dynamism. It is a document that exceeds the personal preferences of its authors and holds the hopes of ulterior generations. Its scope is modern, of clear and simple language, susceptible of continual renovation. It is not written in an extinct language, hard to decipher and referring to esoteric matters. We interpret a Constitution, not the Dead Sea Scrolls.³³⁴

3. Against Compartmentalization

Finally, efforts to define some of the right’s parameters must avoid the compartmentalizing technique that describes *privacy* solely as comprising previously recognized activities, with the effect of precluding the recognition of otherwise valid claims within broader principles. Moreover, the Puerto Rico Supreme Court should conceive the *asserted claim* at a sufficient level of generality so as to avoid its fictitious incompatibility with the constitutional protection of privacy.

I have already exemplified some ways in which Puerto Rican and United States jurisprudence have employed the compartmentalization technique, which isolates the content of the protection into its precise components, and have argued against its narrowing effects. A related matter is the level of generality with which the Court frames the controversies before it.

The level of abstraction with which the Court characterizes the asserted claim may be a determinant factor in the outcome of any given privacy case. That is, “[b]y defining the right broadly or narrowly, one can apparently reach whatever result one desires.”³³⁵ For instance, as Tribe has pointed out, to assert a narrow claim such as the “right to abortion” is, at least in appearance, less legitimate than asserting “the right to make such intimate decisions as the decision whether to have a child.”³³⁶ With the first formulation, because of its specificity, it is easier to

Sostre Lacot v. Echlin, 126 D.P.R. 781, 794 (1990) (Negrón García, J., dissenting) (translation supplied) (emphasis added and footnotes omitted).

333. *Id.*

334. P.R. Tel. Co. v. Martínez, 114 D.P.R. 328, 349-50 (1983) (translation supplied).

335. TRIBE, *supra* note 70, at 100.

336. *Id.*

articulate a defense of its disassociation from the interests which privacy protects. But the later articulation sounds more like a cognizable right within the interests recognized by privacy.

Similarly, one dissenter tried to limit the reach of the protection of privacy by describing the transsexual's claim in *Ex parte Andino Torres*³³⁷ in specific and particular terms like the "right to have a 'sex change' recognized"³³⁸ instead of framing it in broader terms associated to notions of self-definition and human dignity. And to describe the issue in a constitutional challenge to sodomy laws as whether there is a "fundamental right upon homosexuals to engage in sodomy"³³⁹ rather than whether there is a "fundamental interest . . . in controlling the nature of [one's] intimate associations with others"³⁴⁰ is another variation of the same technique.³⁴¹

The dual tactic of compartmentalizing the scope of the right to privacy, in conjunction with framing the asserted claim at a very specific level of abstraction, may be used in some cases to set further apart the asserted claim and the constitutional right. In this sense, the more particular each claim is, the easier it is to portray it as unrelated to the constitutional guarantee. The degrees of the generalities that may be used in both the right claimed and the scope of the protection are, no doubt, filled with indeterminacies that expose the value choices employed in their selection.³⁴² These value choices are inevitable. And the Court must try to address these issues openly in the way in which it believes best achieves the constitutional mandates. To the extent that both the compartmentalization of the right and the practice of framing the claim at a low level of generality are prone to the narrowing of the protection and thus the exclusion of claims from the constitutional scope, these techniques are contrary to the expansive mandate the constitutional text and history provides. Thus, when articulating the contours of the right to privacy, the Supreme Court of Puerto Rico must avoid compartmentalization and all its unprincipled consequences.

337. *Ex parte Andino Torres*, 151 D.P.R. 794 (2000).

338. *Id.* at 823-824 (Rebollo López, J., dissenting).

339. *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986).

340. *Id.* at 206 (Blackmun, J., dissenting). ("The Court claims that its decision today merely refuses to recognize a fundamental right to engage in homosexual sodomy; what the Court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others.").

341. For a detailed analysis of this problem, see TRIBE & DORF, *supra* note 256, at 97-117. See also, *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989). In *Michael H.*, Justice Scalia, joined by Chief Justice Rehnquist, argued for the recourse to the most specific tradition in order to define the asserted right. "We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified. If, for example, there were no societal tradition, either way, regarding the rights of the natural father of a child adulterously conceived, we would have to consult, and (if possible) reason from, the traditions regarding natural fathers in general. But there is such a more specific tradition, and it unqualifiedly denies protection to such a parent." *Id.* But see *id.* at 2346-47 (O'Connor, J., concurring in part) and *id.* at 2349 (Brennan, J., dissenting).

342. TRIBE & DORF, *supra* note 256, at 79-80.

D. CONCLUSIONS ABOUT DECISIONMAKING PRIVACY IN PUERTO RICO

In order to fully accommodate the Madman's identity definition interests in our constitutional order, the Court should approach decisionmaking privacy along the lines described thus far. This means that when approaching *this particular dimension of privacy*, the Court should consider not only (1) the *historical background* of the Puerto Rican Bill of Rights but also (2) the *constitutional protection of privacy* in its relation to the (3) the *independent concept of human dignity*, without pushing this latter concept into the background with a mere secondary role. Also, (4) these contours should be flexible enough to embrace the notion of a living Constitution and permit several privacy claims to be incorporated through time and (5) both the asserted claims and the scope of the right should be framed at sufficient levels of generalities to make an expansive interpretation possible.

First, with regard to the historical background, we have seen how the Constitution of Puerto Rico was built upon foundations that instruct the judiciary to conceive the boundaries of the right to privacy, and the Bill of Rights generally, in a substantively expansive manner. The framers of the Constitution particularly favored a Bill of Rights unconstrained by the minimum scope of the protections as developed in American constitutional law.³⁴³ In this sense, expansiveness should be the interpretative premise. Governmental justifications for the violation of these rights should be presented with the most compelling reasons and judicial departures from an expansive approach should be justified with an elaboration of the right's boundaries in Puerto Rico. An explication should always be put forth.

Second, regarding the specific constitutional protection of privacy, although the framers were preoccupied with governmental and private snooping, the relevant clause talks about the protection of "*vida privada o familiar*," or "private or family life," which recognizes a private sphere in an ample sense and not just to be about secrecy or restricted access. After all, as we have seen, the Supreme Court has construed *privacy* in Puerto Rico to be read expansively in light of its history and background.³⁴⁴ Furthermore, the Constitution refers to "family life," which evokes the broader notion of a private sphere of personal life and family relations in which one engages with others outside the reach of the State. Indeed, in *Figueroa Ferrer v. ELA*, while construing the right of privacy, the Court referred to the "eminently personal area in which the human being has a right to the least possible intervention by the State and in which [the Court] should irrupt only when it is justified by the general interest."³⁴⁵

343. See *supra* Part II(A).

344. See text accompanying *supra* notes 244-248.

345. 107 D.P.R. 250, 275 (1978). In *García Santiago v. Acosta*, 104 D.P.R. 321 (1975), the Supreme Court of Puerto Rico justified the exercise of the State's *parens patriae* authority and suspended the grandparent's custody for two years of a retarded minor based on the best interests of the child. In doing so, it recognized that the "State must reduce at a minimum its intervention with sensitive emotional webs, such as family relations. Intromission into *private life* may be only tolerated when compelling factors

Third, and more specifically, the right to privacy in Puerto Rico must be seen as modified by the concept of human dignity. "The dignity of the human being is inviolable."³⁴⁶ Notwithstanding the elusiveness of this phrase, the dominant understanding about human dignity among many commentators, as we have seen, refers to the idea "*of a distinct personal identity, reflecting individual autonomy and responsibility.*"³⁴⁷ This protection is conceptually related to the notion of privacy as personhood as it has been developed by the decisionmaking privacy jurisprudence. Thus, the Court should take hold of this parallelism to fully incorporate this understanding of privacy in the Constitution. After all, as it has been stated, any reference to the right to privacy in its connection to human dignity in Puerto Rico must not merely echo the understanding that human dignity is complemented by the notion of privacy, but must forcefully identify the framers' formulation that it "*is about personal inviolability in its most complete and ample form.*"³⁴⁸

Finally, the principle of privacy as fostering a space for the development of one's identity provides a broad and flexible framework on which to ground some privacy claims in Puerto Rico, without narrowing down and segregating these claims to their specifics. Of course, this need not be the only approach available,³⁴⁹ but it helps organize the decisionmaking dimension of privacy among a set of ideas that has developed in the privacy jurisprudence and commentary and which the Constitution of Puerto Rico is ready to embrace. That is, the strong recognition of the ability of the individual to develop her personality should be used as a guiding general principle (not a static category) within which to articulate specific interests claimed in the decisionmaking dimension of privacy. Associating the decisionmaking strand of privacy with this personhood thesis provides the basis for a principled approach, but without trying to construct an all encompassing and timeless theory for all notions of privacy. After all, "[t]he central problem of modern constitutionalism is how to reconcile the idea of fundamental law with the modernist insight that meanings are fluid and

such as health, public safety or the human right to life and happiness are affected" *Id.* at 324 (emphasis added).

346. P.R. CONSTITUTION art. II, § 1.

347. Schachter, *supra* note 200.

348. See Report of the Bill of Rights Committee to the Puerto Rico Constitutional Convention, *supra* note 185. It is this sense that we must understand Justice Negrón García's plurality opinion in *Ex parte Andino Torres*, 151 D.P.R. 794 (2000) (recognizing the MTF post-operative transsexual's sex category in the birth certificate) when he framed the human dignity concept in the following terms: "Human dignity covers the most intimate aspects of one's personality." *Id.* See also *López Vives*, 118 D.P.R. at 244 (Naviera de Rodón concurring). "An indispensable element of the right to privacy—in both its modalities—is the *control* that must be recognized and guaranteed to the citizen regarding the different values immersed in the right: values such as the formation of an identity, private and family life and the autonomy in making important decisions." *Id.* (translation supplied).

349. For Jed Rubenfeld's anti-totalitarian thesis see Rubenfeld, *supra* note 27, at 739; Nan Hunter, Nadine Strossen & Jed Rubenfeld, *Contemporary Challenges to Privacy Rights*, 43 N.Y.L. SCH. L. REV. 195, 210-15 (1999); JED RUBENFELD, *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* 221-55 (2001). See also *supra* note 99.

historically changing.”³⁵⁰

The breadth of the notion of privacy in the Constitution, together with these readings of the concept of human dignity in Puerto Rico, leave open the way for—actually invite—ample recognition and protection of the rights of decisionmaking privacy conceived as spheres for the development of one’s personality either individually or through the relationships one forms with others.

III. THE MADMAN’S FUTURE: ABORTION, DEATH, FAMILY RELATIONS AND SEXUAL ORIENTATION

Having developed substantive parameters for approaching decisionmaking privacy cases in Puerto Rico, this Article next explores several instances where such an approach may have a substantial impact. Here is where the Madman’s plight confronts legal masks. That is, these are instances where the law negatively affects individual attempts at identity definition either by directly rejecting such attempts or by encouraging (or coercing) the individual to adopt a legal mask (one which otherwise the individual would not have adopted because it is contradictory to her identity preferences) in a way that limits her self-definitional efforts.

A. ABORTION: THE ROADS NOT TO BE TAKEN

In a series of opinions subsequent to *Roe*, the Supreme Court of the United States began policing the boundaries of the right to abortion and permitted several restrictions on its access. This case law gradually led up to the reformulation of the abortion doctrine in 1992, in *Planned Parenthood v. Casey*.³⁵¹ If the Supreme Court of Puerto Rico sticks to its narrow interpretation (or rather, its non-interpretation) of the right to privacy in this area, these restrictions could be made applicable on the Island. However, because the Puerto Rico Constitution requires a strong and independent construction of privacy, courts should not follow this path.

After *Roe* the United States Supreme Court confronted the regulation of pre- and post-viability abortions. Since, according to *Roe*, throughout the second trimester the interest in safeguarding the health of the woman is compelling, the Supreme Court struck down laws that were not reasonably related to the safeguard of women’s health.³⁵² The Court even struck down regulations for the

350. Morton J. Horwitz, *The Supreme Court 1992 Term Foreword: The Constitution of Change: Legal Fundamentalism Without Fundamentalism*, 107 HARV. L. REV. 30, 116 (1993).

351. 505 U.S. 833 (1992).

352. In *Akron v. Akron*, 462 U.S. 416 (1983), the Court held unconstitutional a provision that required abortion procedures to be performed only in hospitals after the first trimester. This requirement was not reasonably designed to further the state interest in the preservation and protection of maternal health, which is compelling in the second trimester. Furthermore, although the state can require the woman’s written consent in order to insure that the decision is informed and not coerced, in *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), the Court invalidated a provision that required the physician to inform the

third trimester when the interest in the preservation of the life of the unborn is at its peak.³⁵³ On the other hand, however, the Court permitted certain restrictions on abortions for minors,³⁵⁴ and restrictions on governmental funding.³⁵⁵ To some observers, abortion rights were actually limited "to those women over 18 who could afford to pay."³⁵⁶

Between *Roe* and *Casey*, the Court struck down, for instance, a *spousal consent* requirement that gave the husband a veto power over a woman's decision to seek an abortion during the first trimester.³⁵⁷ Since "it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy,"³⁵⁸ her decision alone should prevail. Applying the same reasoning, it struck down a blanket requirement of *parental consent* for abortion of minors under 18 years old.³⁵⁹

However, *parental consent* and *parental notification* requirements were subsequently upheld with regard to unmarried minors, as long as the state provided a judicial bypass of parental consent or notification for a minor who demonstrates in court "that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests."³⁶⁰ Although these restrictions may have a discouraging impact on

woman of the particular risks associated with the procedure. The Court found it objectionable that "the information required [was] designed not to inform the woman's consent but rather to persuade her to withhold it altogether," *Akron*, 462 U.S. at 444, and that it intruded into the discretion of the pregnant woman's physician. *Akron* also held that requiring a 24-hour waiting period after informed consent had been given was unconstitutional.

353. In *Thornburgh v. American College of Obstetricians*, 476 U.S. 747 (1986) other restrictions were invalidated. A requirement that mandated the reporting of certain information regarding the woman was deemed invalid, for it posed the danger of deterring the exercise of the right. And at post-viability two specific requirements were struck down: First, the Court found facially invalid a provision that required the physician to employ the abortion technique that provided the best chance of survival for the fetus. This requirement burdened the woman with an increased risk to her health in order to preserve the life of the fetus. Second, a provision requiring the presence of two physicians in post-viability abortions was held invalid, because it did not provide for a life- or health-saving exception. These last provisions were intended to dissuade late-term abortions, and thus unconstitutional.

354. *Planned Parenthood v. Ashcroft*, 462 U.S. 476, 491 (1983); *Bellotti v. Baird*, 428 U.S. 132 (1976) (*Bellotti I*); *Bellotti v. Baird*, 443 U.S. 622 (1979) (*Bellotti II*).

355. *Maher v. Roe*, 432 U.S. 464 (1977); *Harris v. McRae*, 448 U.S. 297 (1980).

356. *Martha Field, Abortion Law Today*, 14 J. LEGAL MED. 3, 9 (1993).

357. *Danforth*, 428 U.S. 52.

358. *Id.* at 71.

359. *Id.* at 74.

360. *Planned Parenthood v. Ashcroft*, 462 U.S. 476, 491 (1983). With regard to *parental consent* see *Bellotti I*, 428 U.S. at 145: A "statute that prefers parental consultation and consent, but that permits a mature minor capable of giving informed consent to obtain, without undue burden, an order permitting the abortion without parental consultation, and, further, permits even a minor incapable of giving informed consent to obtain an order without parental consultation where there is a showing that the abortion would be in her best interests, . . . would be fundamentally different from a statute that creates a 'parental veto.'" Later in *Bellotti II*, 443 U.S. at 643-42, the rule was further settled: "A pregnant minor is entitled in such a proceeding to show either: 1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or 2) that even if she is not able to make this decision independently, the desired abortion would be in her

young women seeking abortion,³⁶¹ this has been the settled law after *Roe* as it was reaffirmed in *Casey*.³⁶²

The Court also upheld several governmental refusals to fund both non-therapeutic and medically necessary abortions.³⁶³ As the Court candidly observed, “The financial constraints that restrict an indigent woman’s ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency.”³⁶⁴

The result of these cases is extremely troublesome. The government is allowed to allocate its economic resources to actively discourage abortions while denying funds to those poor women who may need one.³⁶⁵ This is compounded by *Rust v. Sullivan*,³⁶⁶ which upheld a federal scheme that prohibited physicians on the government payroll from encouraging, counseling or even making referrals for abortions. The physicians in these programs, which serve people with scarce resources, are impeded from presenting abortion as an alternative method for family planning. In the end, the government is allowed to pay for an ideological message that favors only childbirth, while denying the woman the right to at least have all her reproductive options on the table before choosing.³⁶⁷

best interests. The proceeding in which this showing is made must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained. In sum, the procedure must ensure that the provision requiring parental consent does not in fact amount to the ‘absolute, and possibly arbitrary, veto’ that was found impermissible in *Danforth*.”

This rule has been applied to *parental notification* requirements in *H.L. v. Matheson*, 450 U.S. 398 (1981); *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (Kennedy, J., concurring in part and dissenting in part) (strict two parent notification requirement is unconstitutional, but not if judicial bypass is available); and in *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502 (1990) (*Akron II*).

361. Field, *supra* note 356, at 9 n.15.

362. *Planned Parenthood v. Casey*, 505 U.S. 833, 899 (1992).

363. In *Maher v. Roe*, 432 U.S. 464 (1977), the Court upheld, refusing to apply strict scrutiny, a state regulation that funded childbirth but not non-therapeutic abortions. The right guaranteed in *Roe*, the Court’s argument went, protects against state interference with the woman’s freedom to terminate her pregnancy, nothing more. Thus, the State is not impeded from having a preference towards childbirth and expressing that preference through the allocation of funds. *Id.* at 473-74. “The State may have made childbirth a more attractive alternative, thereby influencing the woman’s decision, but it has imposed no restriction on access to abortions that was not already there.” *Id.* at 474.

In *Harris v. McRae*, 448 U.S. 297 (1980), the Court went a step further and upheld an amendment to the Medicaid Act (the Hyde Amendment) which denied public funding to many medically necessary abortions, except those necessary to preserve the life of the mother or where pregnancy was the result of rape or incest, and the rape or incest was reported promptly to law enforcement authorities. As a result, states participating in the Medicaid program are not obliged to fund such abortions.

364. *Harris*, 448 U.S. at 316.

365. Field, *supra* note 356, at 8.

366. 500 U.S. 173 (1991).

367. See *id.* at 216-17 (Blackmun, J., dissenting). The principle that the government can control the message conveyed by federally funded programs has been extended to other contexts. See *United States v. Am. Library Ass’n*, 539 U.S. 194 (2003) (upholding Internet filtering requirements for federally funded public libraries); *Rumsfeld v. FAIR*, 547 U.S. 47 (2006) (without technically relying on *Rust*, upholding

The situation is similar in Puerto Rico.³⁶⁸ Although in the past the Puerto Rican government sponsored sterilization and tolerated abortion clinics for eugenic and population-control reasons, the abortion subject is now a political problem that few elected officials dare to seriously address or propose funding.³⁶⁹ Perhaps the basic doctrinal problem with the right to choose an abortion is its limitations as a negative right. And for that matter, conceiving privacy as a protection from governmental interference with the development of one's personality suffers the same problems.³⁷⁰ But as Dorothy Roberts argues, privacy claims are not necessarily incompatible with a government that assumes some affirmative responsibilities.³⁷¹ An alternative concept of privacy should include

not only the negative proscription against government coercion, but also the affirmative duty of government to protect the individual's personhood from degradation and to facilitate the processes of choice and self-determination. This approach shifts the focus of privacy theory from state nonintervention to an affirmative guarantee of personhood and autonomy.³⁷²

the denial of federal funds to those higher education institutions that refused to give military recruiters access to their facilities).

368. The government simply does not give any financial aid for the performance of an abortion or its potential medical consequences. For instance, worker's compensation for disability for a non-occupational illness or injury not connected with employment *excludes* "any disability . . . caused by or related to an abortion, except in cases of induced abortions for medical reasons or if complications arise as a result thereof." 11 L.P.R.A. 203 (g)(2).

369. COLÓN, ET AL., *supra* note 72, at 88.

370. See Dorothy E. Roberts, *Punishing Drug Addicts who have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991).

This critique is correct in its observation that the power of privacy doctrine in poor women's lives is constrained by liberal notions of freedom. First, the abstract freedom to choose is of meager value without meaningful options from which to choose and the ability to effectuate one's choice. The traditional concept of privacy makes the false presumption that the right to choose is contained entirely within the individual and not circumscribed by the material conditions of the individual's life The abstract freedom of self-definition is of little help to someone who lacks the resources to realize the personality she envisions or whose emergent self is continually beaten down by social forces. Defining the guarantee of personhood as no more than shielding a sphere of personal decisions from the reach of government—merely ensuring the individual's "right to be let alone"—may be inadequate to protect the dignity and autonomy of the poor and oppressed.

The definition of privacy as a purely negative right serves to exempt the state from any obligation to ensure the social conditions and resources necessary for self-determination and autonomous decisionmaking. Based on this narrow view of liberty, the Supreme Court has denied a variety of claims to government aid.

Id. at 1477-79.

371. *Id.*

372. *Id.* at 1479. "Ultimately," Tribe states, "the affirmative duties of government cannot be severed from its obligations to refrain from certain forms of control; both must respond to a substantive vision of the needs of human personality." TRIBE, *supra* note 29, at § 15-2, 1305.

The framers of the Puerto Rico Constitution initially conceived of a more active State in terms of the governmental obligation to guarantee social and economic rights.³⁷³ This progressive notion is usually associated with workers' rights and social protections specifically protected in the Constitution.³⁷⁴ In the context of traditional civil and political rights, including the right to privacy, this notion has not been forcefully put forth. But the Court once suggested that these positive obligations might be applicable to the right of privacy and human dignity:

The rights to privacy and the protection against abusive attacks upon honor and personal reputation consecrated in sections 1 and 8 of our Bill of Rights . . . have a special prominence in our constitutional order . . . Both constitutional provisions impose on the State *a double role*: that of *abstaining from* acting in a way which would violate the realm of autonomy and individual privacy and *to act in a positive manner* in the benefit of the individual.³⁷⁵

The constitutional landscape of the right to abortion changed substantially after *Planned Parenthood v. Casey*,³⁷⁶ in which the Court abandoned the trimester framework, while it sought to preserve “the essential holding of *Roe*” through the substantially less stringent *undue burden* standard. That is, it upheld the moment of *viability* as the predominant point that triggers governmental authority to restrict the right to choose an abortion. But, as opposed to *Roe*, before viability the state has some regulatory leeway (which is rather imprecise) that is only limited by this new undue burden standard. This standard, and more importantly its consequences, must be critically examined in Puerto Rico from the self-definition perspective when and if the appropriate opportunity comes.

In *Casey*, many of the restrictions that had been struck down under *Roe* were reevaluated and upheld under this standard. A plurality of the Court held that a state regulation imposes an *undue burden* when it has “the purpose and effect of placing a substantial obstacle in the path of the woman seeking an abortion of a nonviable fetus”,³⁷⁷ and that the state has a substantial interest in potential life, *throughout pregnancy*, and not just after viability.³⁷⁸

Applying this standard, the Court upheld: (1) an informed consent requirement by which the physicians must inform of the availability of literature with

373. See TRÍAS MONGE, *supra* note 170, and accompanying text.

374. See P.R. CONST. art. II, §§ 17, 18, 20 (The first two sections include the right to organize, bargain collectively, and the right to strike and picket. Section 20 was eliminated by Congress, but was the most progressive). See TRÍAS MONGE, *supra* note 170, and accompanying text).

375. Soc. de Ganaciales v. Royal Bank de P.R., 145 D.P.R. 178, 201 (1998) (translation supplied) (emphasis added).

376. 505 U.S. 833 (1992).

377. *Id.* at 877.

378. *Id.* at 876, 878.

information regarding the fetus and alternatives to abortion as well as the risks involved;³⁷⁹ (2) a 24-hour waiting period;³⁸⁰ and (3) a reporting and record-keeping requirement.³⁸¹ These measures had been struck down during the *Roe* era.³⁸² More recently, the Court has been inclined to use the undue burden standard liberally in favor of governmental restrictions.³⁸³

Casey struck down a *spousal notification* requirement, on the basis that it represented a substantial obstacle to obtaining an abortion because such a requirement could expose the woman to the terrible problem of domestic abuse.³⁸⁴

It is doubtful whether the spousal notification holding is consistent with the 24-hour waiting period requirement.³⁸⁵ On one hand, in the United States, the effort to travel from rural areas to places where abortions are accessible may eliminate the abortion option for many women.³⁸⁶ In Puerto Rico, because of the close proximity between towns, this problem is arguably lessened. But it is equally problematic for women living in small communities to justify their absence without arising suspicions regardless of the distance. If a requirement like this were enacted in Puerto Rico, its effect would be a *de facto* spousal notification enforced by these close communities. Also, short distances *per se* are not a guarantee of accessibility. Since the legalization of abortion in Puerto Rico, legal clinics emerged mainly in the metropolitan area, San Juan, and just a few of them in other nearby cities. But there are no abortion clinics today operating in the small towns of the Island.³⁸⁷

As argued throughout this Article, in Puerto Rico things could be different. Especially in the case of abortion, the Court should not approach the important and fundamental issues involved (*i.e.* women's right to control their destiny and shape their lives) by merely mimicking federal decisions.

379. *Id.* at 881.

380. *Id.* at 885.

381. *Id.* at 900.

382. See Field, *supra* note 355 at 12.

383. Compare *Stenberg v. Carhart*, 530 U.S. 914 (2000) (A broad ban on late-term abortion procedures, which as interpreted included the most commonly used procedure (D&E) as well as "partial birth abortions" (D&X), was held to create an undue burden on the availability of late-term abortions. Furthermore, the sweeping prohibition of D&X throughout the entire pregnancy without a life and health exception, creates a significant health risk to the woman) with *Gonzalez v. Carhart*, 550 US ____ (2007), 127 S.Ct. 1610, decided April 18, 2007 (declaring constitutional validity of a prohibition on *intact* D&X procedures, even when it only provided an exception to safeguard the mother's life and not a health exception). See also *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320 (2006) (refusing to allow a facial challenge to restrictive abortion law and remanding case to lower court to consider constitutional validity of particular applications of the challenged statute).

384. *Casey*, 505 U.S. at 888-99.

385. See Field, *supra* note 356, at 14.

386. Again, the specter of *Maher* and *Harris* haunts this jurisprudence because this particularly affects poor women.

387. COLÓN ET AL., *supra* note 72, at 93.

B. THE RIGHT TO DIE

On November 17, 2001, the Governor of Puerto Rico signed a *Living Will Act*, the first in the Island's history.³⁸⁸ Although the Supreme Court of the United States has framed the right to die under the term *liberty* in the Due Process Clause, and not under the right to privacy, in its statement of motives the Legislature based this law in Article 1 of the Bill of Rights, specifically on "the right to privacy: the right to the protection by the State, against abusive attacks upon the honor and dignity of individuals."³⁸⁹

This law addresses the claim of *the right to privacy and the recognition of the autonomous will of the individual*, and incorporates into our legal order a legal process whereby an adult individual, with the plain enjoyment of her mental faculties, could state her desire that in the eventuality of suffering from a *terminal health condition*[³⁹⁰] or *persistent vegetative state*,[³⁹¹] her body be subjected or not subjected, to a determinate medical treatment.³⁹²

Under this law, the declaration must be in writing before a notary public or one doctor plus two witnesses.³⁹³ The person can confer upon an agent the power of attorney to make decisions on her behalf to reject or accept treatment in case the patient is unconscious.³⁹⁴ But if no such person is designated, the law provides a legally determined succession, beginning with the spouse, for allocating those decisions among family members.³⁹⁵ The law is not clear on this area, but because the designation of a surrogate decision-maker is optional, it seems that this allocation among relatives is triggered only when the patient has established vague standards about which treatments to refuse and a specific agent has not been named.³⁹⁶ Also, although the patient can reject a wide range of medical

388. Ley de declaración previa de voluntad sobre tratamiento médico en caso de sufrir una condición de salud terminal o de estado vegetativo persistente, Law 160 of 2001, 24 L.P.R.A. §§ 3651-3663 (2006).

389. *Id.* (Statement of Motives) (translation supplied).

390. A terminal health condition means "an incurable and irreversible health condition or illness that has been medically diagnosed and that, according to illustrated medical judgment, would provoke the death of the patient within six months." *Id.* at § 3651(c).

391. A persistent vegetative state means "a health condition that impedes any type of expression of the will from the patient, by reason of being in state of unconsciousness in which there is no cortical or cognitive cerebral function, and for which there is no realist possibility of recovery according to established medical standards." *Id.* at § 3651(d).

392. *Id.* (Statement of Motives) (translation supplied) (emphasis added).

393. 24 L.P.R.A. § 3653.

394. 24 L.P.R.A. § 3652.

395. *Id.*

396. See Statement of Motives. "The person making the statement may select an agent . . . [In] the eventuality of not having disposed of a particular medical situation in the living will, the agent [can] make the decisions, in accordance with the values and ideas of the declaring person." (translation supplied).

treatments,³⁹⁷ she is prohibited from preventing the administration of palliative care or to be hydrated and fed, unless death is imminent or unless the body is not able to absorb the administered food or hydration.³⁹⁸ Finally, the law prohibits the practice of euthanasia or the hastening of death for compassion.³⁹⁹

Because this is an extremely complicated subject both at legal and ethical levels, I will limit my discussion to just some of the constitutional problems that have been presented in the U.S. Supreme Court in order to briefly frame the Puerto Rican law. The Supreme Court of Puerto Rico has not spoken on this issue.

In a nutshell, in U.S. constitutional law there is no fundamental right to die. The U.S. Supreme Court has recognized a liberty interest in refusing unwanted medical treatment as a corollary to the common law doctrine of informed consent.⁴⁰⁰ The State, however, to insure reliability of the conscious patient's expressions regarding the refusal of life-saving treatment, may require the surrogate to present clear and convincing evidence of the patient's wishes.⁴⁰¹ On the other hand, gravely ill patients who are not on life support treatment do not have a liberty interest in requiring a physician to hasten their deaths.⁴⁰² Thus, state criminal laws prohibiting physician-assisted suicide are enforceable in those situations,⁴⁰³ while patients on life support can refuse their life-saving treatments because they hold a liberty interest.⁴⁰⁴

The disparate situation in which patients on life support can refuse treatment and thus quickly approach death, *vis-à-vis* those patients not on life support who cannot hasten their deaths, was upheld on Equal Protection grounds in *Vacco v. Quill*.⁴⁰⁵ In *Vacco*, the Court differentiated between assisted suicide and refusal of treatment by focusing on the requisite intent. Concurring in *Cruzan v. Director*,⁴⁰⁶ Justice Scalia argued that in reality there is no difference between killing and letting a patient die aside from their affirmative and negative formulations. "Starving oneself to death is no different from putting a gun to one's temple as far as the common-law definition of suicide is concerned."⁴⁰⁷ To

397. Medical treatment means "any kind of treatment, procedure or medical intervention administered to a patient to sustain, reinstate or implant vital functions, when they are administered with the only potential of artificially prolonging the moment of death, and when according to the best medical judgment, death is imminent regardless of those procedures. These include, among others, cardiopulmonary resuscitation, diagnostic tests, dialysis, medicines, respirators surgery or invasive diagnostics methods, blood transfusions and derived products." 24 L.P.R.A. § 3651(b) (2006).

398. 24 L.P.R.A. § 3652 (2006).

399. 24 L.P.R.A. § 3662 (2006).

400. *Cruzan v. Director*, 497 U.S. 261 (1990).

401. *Id.*

402. *Washington v. Glucksberg*, 521 U.S. 702 (1997).

403. *Id.*

404. *Cruzan*, 497 U.S. at 261.

405. *Vacco v. Quill*, 521 U.S. 793 (1997).

406. 497 U.S. 261 (1990).

407. *Cruzan*, 497 U.S. at 296.

avoid this problem, the Court turned to *intent* in search of a rational justification for differentiating between the two classifications.⁴⁰⁸ Thus, laws prohibiting assisted suicide can be applied against physicians who administer drugs to terminally ill patients *with the intention of hastening their death*; but not to physicians *who refuse to administer life-saving treatment*, even if the consequences are the same.⁴⁰⁹ The relevant (albeit semantic) difference in intention is between killing and letting a patient die. This intent-based difference, however, seems artificial, especially since palliative treatment can be administered to alleviate suffering to the point of inducing unconsciousness or even death.⁴¹⁰ In any event, the Court in this line of cases never foreclosed the possibility that in an appropriate case, perhaps one where the person is terminally ill and endures intense suffering where no palliative care is available for her, a person may have a liberty interest in having a physician hasten her death.⁴¹¹

Strictly under this doctrine, the law in Puerto Rico is unobjectionable. The law provides a specific mechanism for the government to insure the accuracy of the patient's wishes while conscious (a written declaration before a notary public or one doctor and two witnesses).⁴¹² It also rejects the possibility, as upheld in *Washington* and *Vacco*, of assisted suicide.⁴¹³

Yet, there are important self-definitional considerations that this case law ignored, and which have particular importance in Puerto Rico's constitutional context. As Justice Stevens argued in his *Cruzan* dissent, decisions about death—about how one chooses to give closure to one's life—are as important to the framing of one's *personhood* as other decisions carried on in life:

[D]eath is not life's simple opposite, or its necessary terminus, but rather its completion. Our ethical tradition has long regarded an appreciation of mortality as essential to understanding life's significance. It may, in fact, be impossible to live for anything without being prepared to die for something.⁴¹⁴

In this sense it is the person, not the state, who gives definition to her life. This self-definitional process includes the selection of how one passes away, because

408. *Vacco*, 521 U.S. at 801 ("The distinction comports with fundamental legal principles of causation and intent. First, when a patient refuses life-sustaining medical treatment, he dies from an underlying fatal disease or pathology; but if a patient ingests lethal medication prescribed by a physician, he is killed by that medication Furthermore, a physician who withdraws, or honors a patient's refusal to begin, life-sustaining medical treatment purposefully intends, or may so intend, only to respect his patient's wishes and 'to cease doing useless and futile or degrading things to the patient when [the patient] no longer stands to benefit from them.'").

409. *Id.* at 807-08.

410. See *Washington v. Glucksberg*, 117 S. Ct. 2258, 2310 (1997) (O'Connor, J., concurring).

411. *Vacco*, 521 U.S. at 809 n.13; *Washington*, 521 U.S. at 735 n.24.

412. See 24 L.P.R.A. § 3653 (2006).

413. *Id.* at § 3662.

414. *Cruzan v. Director*, 497 U.S. 261, 343 (1990) (Stevens, J., dissenting).

"how [a person] dies will affect how that life is remembered."⁴¹⁵ To deny such possibility "is to deny the personhood of those whose lives are defined by the State's interests rather than their own."⁴¹⁶ And a highly stringent standard of proof of the incompetent's wishes as to the withdrawal of treatment may impinge upon the patient's definition of her life.

From the Madman's viewpoint, the formalities for the living will in Puerto Rico could, for example, be challenged under Puerto Rico constitutional law. Consider the relatives of a patient in a persistent vegetative state who did not follow the law. If the family wants to terminate the patient's life-saving treatment, they would probably assert that—as her closest relatives—they know her true wishes, or present some other kind of "clear and convincing evidence" of such will rather than the required written declaration authenticated by a notary public or signed by a physician and two witnesses. In such a situation, the Court should do more than cite the federal cases. Much more seems to be at stake than finding cases-on-point. "A right to determine when and how to die would have to rest on constitutional principles of privacy and personhood or on broad, perhaps paradoxical, conceptions of self-determination."⁴¹⁷

One of the rationales for upholding the clear and convincing evidence standard in *Cruzan* was that such a rule "serves as 'a societal judgment about how the risk of error should be distributed between the litigants.'"⁴¹⁸ The risk of an erroneous decision, reasoned the Court, can reasonably be put upon the litigants who challenge a strong evidentiary rule because:

An erroneous decision not to terminate [treatment] results in a maintenance of the *status quo*; the possibility of subsequent developments such as advancements in medical science, the discovery of new evidence regarding the patient's intent, changes in the law, or simply the unexpected death of the patient despite the administration of life-sustaining treatment at least create the potential that a wrong decision will eventually be corrected or its impact mitigated. *An erroneous decision to withdraw life-sustaining treatment, however, is not susceptible of correction.*⁴¹⁹

This justification is nothing more than a statement, as an underlying rationale, of a preference of life over death,⁴²⁰ and thus could be seen as an interference with the patient's wish to shape her personality. Requiring a stronger evidentiary standard for changing the status quo (in *Cruzan* it is a clear and convincing

415. *Id.* at 344.

416. *Id.* at 356.

417. TRIBE, *supra* note 29, at § 15-12, 1370.

418. *Cruzan*, 497 U.S. at 283.

419. *Id.* (emphasis added).

420. See Louis Michael Seidman, *Confusion at the Border: Cruzan, "The Right to Die," and the Public/Private Distinction*, 1991 SUP. CT. REV. 47, 54.

evidence standard, in Puerto Rico it is even stronger)⁴²¹ presupposes that this particular *status quo*—life in a persistent vegetative state—is preferable to life as defined by the patient who chooses to culminate it with dignity. From the perspective of the patient who wants to define her place in life and how to end it, a rule that makes it difficult to change the *status quo* impinges upon that ability and imposes a preference for one characterization of her life.⁴²²

But an extremely permissive approach, and a broad protection of the rights of self-determination, may still be dangerous. An expansive right to die, Tribe states, “might be uncontrollable and might prove susceptible to grave abuse.”⁴²³ In fact, one of the main reasons used by the Court in *Washington v. Glucksberg* to uphold the prohibition of assisted suicide was that a broad right might open the possibility for foul play.⁴²⁴

Cases of patients in persistent vegetative states raise equal or even greater potential for coercion and abuse. After all, at stake is a third party’s decision to terminate another’s life.⁴²⁵ In this sense, in every case there seems to be a tension between abuse and personhood. A rule favoring the *termination* of life-sustaining treatment may entail, under different scenarios, either the materialization of a right to die with dignity or an undervaluation or abuse of the patient’s life.⁴²⁶ A rule in favor of *treatment* could perhaps prevent abuse; but it may overvalue a particular image of the patient’s life while compromising her desire to complete life with dignity.⁴²⁷ Perhaps these conflicts are inescapable and criteria must be selected at some point to adjudicate these matters. But one thing is clear: As

421. 24 L.P.R.A. § 3653 (2006).

422. See *Cruzan*, 497 U.S. at 353 (Stevens, J., dissenting)

Insofar as Nancy Cruzan has an interest in being remembered for how she lived rather than how she died, the damage done to those memories by the prolongation of her death is irreversible. Insofar as Nancy Cruzan has an interest in the cessation of any pain, the continuation of her pain is irreversible. Insofar as Nancy Cruzan has an interest in a closure to her life consistent with her own beliefs rather than those of the Missouri Legislature, the State’s imposition of its contrary view is irreversible. To deny the importance of these consequences is in effect to deny that Nancy Cruzan has interests at all, and thereby to deny her personhood in the name of preserving the sanctity of her life.

423. TRIBE, *supra* note 29, at §15-11, 1370.

424. *Washington v. Glucksberg*, 521 U.S. 702, 731-32 (“[T]he State has an interest in protecting vulnerable groups—including the poor, the elderly, and disabled persons—from abuse, neglect, and mistakes The State’s interest here goes beyond protecting the vulnerable from coercion; it extends to protecting disabled and terminally ill people from prejudice, negative and inaccurate stereotypes, and ‘societal indifference’ The risk of harm is greatest for the many individuals in our society whose autonomy and well-being are already compromised by poverty, lack of access to good medical care, advanced age, or membership in a stigmatized social group.”).

425. *Cruzan*, 497 U.S. at 281. “Not all incompetent patients will have loved ones available to serve as surrogate decision-makers. And even where family members are present, ‘[t]here will, of course, be some unfortunate situations in which family members will not act to protect a patient.’ A State is entitled to guard against potential abuses in such situations.” *Id.*

426. See TRIBE, *supra* note 29, at §16-31, 1599 (referring to these kinds of decisions in the context of handicapped patients).

427. *Id.* at 1600.

self-definitional interests are profoundly implicated in this kind of decision, it is a matter that requires a subtler and more delicate analysis than what a mere reference to U.S. Supreme Court case law may afford.

C. FAMILY RELATIONS: HOW FAR CAN THE GOVERNMENT GO WHEN FAVORING PREFERRED FAMILY RELATIONS AND DISCOURAGING OTHER ARRANGEMENTS?

An experience of intimacy is first of all an experience of relationship in which we are deeply engrossed. It is an experience so intense that it wholly shapes our consciousness and action.⁴²⁸

As in the abortion context, the Puerto Rican Supreme Court has shown a prominent reluctance to expand decisionmaking privacy rights to familial relationships. We have seen one instance of this ambivalence when discussing the Supreme Court's general approach to privacy in Puerto Rico.⁴²⁹ Specifically, we saw the Court's compartmentalization of the right to marry when denying an unmarried couple the statutory right to adopt a child. That methodological move was accompanied by a substantive rejection of the broader right to form intimate associations. This section examines the extent to which the self-definitional character of these intimate associations place limits on State action that discriminates or burdens such associations.

1. Intimate Associations

Since the 1920s the U.S. Supreme Court has developed a jurisprudence identifying a fundamental private sphere in family relations. In *Meyer* and *Pierce*, the Court recognized parents' right to direct and give content to the upbringing of their children's education against governmental efforts to excessively standardize their personalities.⁴³⁰ Also, in *Prince v. Massachusetts*, while upholding some limitations to parental rights upon their children, the Court reaffirmed the existence of a private realm of family life inaccessible to the State. Finally, in *Wisconsin v. Yoder*,⁴³¹ the United States Supreme Court held that a state compulsory school attendance law, which required school attendance until the age of 16, violated the First Amendment interests of an Amish family who did not want to send their children to high school. The Court found in *Yoder* that "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established as an enduring

428. Robert S. Gerstein, *Intimacy and Privacy*, 89 ETHICS 76 (1978), reprinted in PHILOSOPHICAL DIMENSIONS, *supra* note 75, at 264.

429. See *supra* Part II(b)(3)(b), text accompanying *supra* notes 281-301.

430. A concern which is similarly reflected in the famous flag salute case, *West Virginia v. Barnette*, 319 U.S. 624 (1943).

431. 406 U.S. 205 (1972).

American tradition.”⁴³²

With regard to marriage, there are constitutional limits to governmental regulations of *entry into marriage*, such as the limits that the Equal Protection clause provides against the miscegenation statute struck down in *Loving v. Virginia*,⁴³³ where the Court also recognized marriage as fundamental. But it was in *Zablocki v. Redhail*⁴³⁴ that the United States Supreme Court solidified the right to marry, clearly establishing that marriage has fundamental importance. In *Zablocki*, the Court struck down a statute that conditioned marriage upon compliance with previous child support obligations and proof that children under support were not likely to become “public charges.” “It would make little sense,” stated the Court, “to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.”⁴³⁵ In *Turner v. Safely*,⁴³⁶ the Court extended this right to inmates, striking down a state regulation that prohibited prisoners from marrying unless the prison superintendent approved of the marriage after finding that there were compelling reasons, such as pregnancy or birth.⁴³⁷

In Puerto Rico, few cases have dealt with the contours of the constitutional protection afforded to marriage. In *Sostre Lacot v. Echlin*,⁴³⁸ the Court denied *certiorari* where plaintiffs (a couple of married co-workers) sought a private cause of action for private employment discrimination based on their marital status. After *Sostre Lacot v. Echlin*, the Legislature amended the employment discrimination statute to provide for such cause of action. Furthermore, in *Belk Arce v. Martínez*,⁴³⁹ the Court held that marriage constituted an impermissible ground for private employment discrimination and applied the newly enacted law permitting the claim. The Court in *Belk Arce* took the opportunity to express that the right to privacy, in its mode of “autonomy to make decisions regarding intimate or family life, undoubtedly includes the individual’s right to marry,

432. *Id.* at 232. For a more recent development, see *Troxel v. Granville*, 530 U.S. 57 (2000) (Substantive due process in child-rearing decisions protects a custodial mother’s right to object against state imposition of grandparents’ rights to visit). The extent to which these decisions portray a notion of parental control that fails to recognize the children’s interests may be problematic and may present other problems outside the scope of this Article. See WEISBERG & APPLETON, *supra* note 28, at 960-62; Bennett Woodhouse, *supra* note 28, at 996. Some cases in Puerto Rico regarding this area are: *Rexach v. Ramírez Vélez*, 2004 TSPR 97 (June 15, 2005) (on the validity of a grandparent visitation rights statute); *Sterzinger v. Ramírez*, 116 D.P.R. 762 (1985) (parent’s right to maintain relations with biological son or daughter is a protected privacy interest); *García Santiago v. Acosta*, 104 D.P.R. 321 (1975) (privacy and family relations are supreme, but the State may intervene when the best interest of the child justifies the provisional or permanent removal from the custody of grandparents).

433. 388 U.S. 1 (1967).

434. 434 U.S. 374 (1978).

435. *Id.* at 386.

436. 482 U.S. 78 (1987).

437. *Id.* at 82.

438. 126 D.P.R. 781 (1990).

439. 146 D.P.R. 215 (2006).

without undue interference by the State or private persons. This right cannot be subordinate to external factors *that substantially impede its enjoyment.*⁴⁴⁰

But the right to marry is not unlimited. In *Zablocki*, the Court held that “reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.”⁴⁴¹ The challenged law in *Zablocki* did present such *significant interference*, and was thus held invalid.⁴⁴²

Aside from restrictions on entering marriage, a different and more complicated matter is *when a law distinguishes between married and unmarried persons for purposes of granting a benefit or imposing a burden.*⁴⁴³ When the government disfavors certain associations by denying them specific benefits, and when such denial coerces the individual to adopt an unwanted identity (a legal mask from the Madman’s viewpoint), a constitutional issue may arise. I will approach the subject considering whether the government can distinguish between married and unmarried couples for purposes of statutory adoption rights. In what follows I will tackle this thorny problem, not through an equality analysis (i.e., Equal Protection Clause or discrimination rationale), but through the substantive views so far expounded regarding privacy as personhood.

2. About disfavored family associations and the limits of governmental discrimination

As previously examined, in *Pérez Vega v. Procurador*,⁴⁴⁴ the Supreme Court upheld a denial of a petition for adoption made by an unmarried couple of a child they had under their legal custody since she was twenty days old.⁴⁴⁵ As recognized by the appropriate governmental officials, granting the adoption would have been in the best interest of the child.⁴⁴⁶ The couple had been living together for twelve years, rearing their biological children.⁴⁴⁷ The law in Puerto Rico prohibits joint adoptions by unmarried couples; only married persons can adopt jointly.⁴⁴⁸ The Court rejected a challenge claiming that the law established

440. *Belk Arce*, 146 D.P.R. at 227. (translation supplied) (emphasis added).

441. *Zablocki v. Redhail*, 434 U.S. 374, 387 (1978).

442. Only guidance into what *significant interference* means was given when the Court distinguished the *significant interference* in *Zablocki* with a previous case, *Califano v. Jobst*, 434 U.S. 47 (1977), where the Court upheld a Social Security scheme that denied disabled children’s benefits if they married a non-beneficiary of the program, but retained the benefits upon marriage to a beneficiary. See text accompanying *infra* notes 484.

443. “A classification based on marital status is fundamentally different from a classification which determines who may lawfully enter into marriage.” *Zablocki*, 434 U.S. at 404-04 (Stevens, J., concurring).

444. 148 D.P.R. 201 (1999). See text accompanying *supra* note 287, *et seq.*

445. *Id.* at 207.

446. *Id.* at 225.

447. *Id.* at 228, 238.

448. See Article 133 of the Puerto Rico Civil Code, 31 L.P.R.A. § 534 (“No one may be adopted by more than one person, except when the adopters are married to each other, in which case they shall adopt jointly.”).

an unconstitutional classification between married and unmarried persons that affected the petitioners' fundamental right to privacy.⁴⁴⁹ In concluding that the plaintiffs did not have a constitutionally protected privacy interest, the Court held that they were "missing one of the essential elements that confer the decision to marry its high esteem" (*i.e.*, the desire to *enter into* a marital relationship).⁴⁵⁰ The Court was wrong in this conclusion. In approaching the problem, it should have distinguished between the recognition of the constitutional rights at stake, on one hand, and the legitimacy of the legal distinction made, on the other.

The Court should have recognized that the right not to be married and enter into an informal intimate relationship with another person as if married is protected by the right to privacy. That is, the court should have recognized the right to enter into an informal marriage. This issue is different from the question of whether the state could legitimately distinguish between married and unmarried persons for purposes of adoption law. But to the extent that the Court rejected this initial step, it abandoned its constitutional task of reading the right to privacy expansively and protecting the ability of individuals to form their identities through their relationships with others.

One way to argue for the recognition of this right is to posit that because we have a fundamental right to *decide* whether to enter into the marital relation (not just to enter into it), we have an equally fundamental right not to be forced into marriage and thus the right to *remain unmarried*.⁴⁵¹ Narrowly read, *Loving*, *Zablocki* and *Turner* only established a right to *marry*, and not the right to *decide whether* to marry. It was precisely in this restrictive way that the Court in *Pérez Vega* interpreted these cases. But just as the right to abortion entails more than the right to destroy a fetus, the right to marry entails more than the right to *enter into* marriage. "Unless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under [the due process clause]"⁴⁵² we must consider the broader sense in which the cases are important. It is clear that the privacy jurisprudence since *Meyer* recognizes a broad protected space in which we can make some important decisions, crucial for the development of our personalities. In this sense, this protection guarantees the right to decide *whether or not* to marry as part of our definitional process and not just the right to *marry*.⁴⁵³ Moreover, since in Puerto Rico—by virtue of the right

449. *Pérez Vega*, 148 D.P.R. at 218-22.

450. *Id.* at 219.

451. Indeed, in *Casey* the Court used a similar rationale to explain why abortion is a protected activity. "If . . . the woman's interest in *deciding whether* to bear and beget a child had not been recognized as in *Roe*, the State might as readily restrict a woman's right to choose to carry a pregnancy to term as to terminate it, to further asserted state interests in population control, or eugenics, for example." *Casey*, 505 U.S. at 859 (emphasis added). That is, because the woman has the right to *decide whether* or not to have a child, the state cannot force her to have it, nor force her to not have it.

452. *Moore v. City of East Cleveland*, 431 U.S. 494, 501 (1977).

453. As one author has put it, "[i]t is the *choice* to form and maintain an intimate association that permits full realization of the associational values we cherish most . . . [I]ntimacy implies the choice *not*

to privacy—a married couple has the constitutional right to actively dissolve the marital relation on demand, the right to remain unmarried should logically follow.⁴⁵⁴

Furthermore, the Court should have recognized as protected under the right to privacy, not only the right to remain unmarried, but also the affirmative right *to enter into* an informal relation, cohabit as if married, and form an intimate association.⁴⁵⁵ As already quoted,⁴⁵⁶ *Roberts v. United States Jaycees*⁴⁵⁷ recognized that the Constitution “[affords] the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State.”⁴⁵⁸ The constitutional protection given to, for instance, the nuclear marital family, the biological extended family, and childbearing and rearing, “reflects the realization that individuals draw much of their emotional enrichment from close ties with others.”⁴⁵⁹ According to *Roberts*, the protection of these relationships “safeguards the ability independently to define one’s identity that is central to any concept of liberty.”⁴⁶⁰ The protection of these kinds of intimate relationships cannot be limited to the marital relation. After all, one of the main lessons in *Eisenstadt* is that the constitutional right of privacy “must be the same for the unmarried and the married alike.”⁴⁶¹ Thus, both married and unmarried persons have the same fundamental right to get together and form a family.⁴⁶²

One possible impediment to this conclusion may be the definitions of family that the Supreme Court of the United States has at times embraced for constitutional purposes. In *Moore v. City of East Cleveland*,⁴⁶³ a plurality found

to associate oneself in intimate ways with the world at large.” Karst, *supra* note 102, at 636-37 (emphasis added); *see also* *United Foods*, 533 U.S. 405 (the right not to associate); *Barnette*, 319 U.S. 624 (the right to speak entails the right not to speak).

454. *Figueroa Ferrer*, 107 D.P.R. 250.

455. “Formal associational status plainly is neither a necessary nor a sufficient condition for the realization of the values of intimate association.” Karst, *supra* note 102, at 64; *see also* *Hollenbaugh v. Carnegie Free Library*, 439 U.S. 1052 (1978), *cert. denied* (Marshall, J., dissenting).

Petitioners’ choice of living arrangements for themselves and their child is thus sufficiently close to the interests we have previously recognized as fundamental and sufficiently related to the constitutional guarantee of freedom of association that it should not be relegated to the minimum rationality tier of equal protection analysis, a disposition that seems invariably fatal to the assertion of a constitutional right.

Id. at 1056.

456. *See supra* note 106.

457. 468 U.S. 609.

458. *Id.* at 618.

459. *Id.* at 619.

460. *Id.* at 619.

461. *Eisenstadt*, 405 U.S. at 453.

462. Indeed, in *Meyer v. Nebraska* the Court recognized the right to marry but also, and more generally, the right to “establish a home and bring up children.” 262 U.S. 390, 399 (1923) (emphasis added).

463. 431 U.S. 494.

that an *extended family* living arrangement composed of *blood-relatives* was a constitutionally protected association, while in *Belle Terre v. Boraas*,⁴⁶⁴ (without addressing the situation of unmarried couples) it held that a prohibition of cohabitation of three or more *unrelated* persons did not affect the right to privacy nor the right of association.⁴⁶⁵ Also, in *Michael H. v. Gerald D.*,⁴⁶⁶ the plurality upheld—against the biological father’s substantive due process claim of a general right to parenthood—a California statutory presumption providing that a child born into marriage is the child of the marriage. *Michael H.* held that the constitutionally protected family was the traditional unitary family.

However, this case law must be seen in light of the broader spectrum of constitutional protection for family relations and intimate associations. While referring to the First Amendment’s freedom of expressive association, the United States Supreme Court has held that this constitutional protection is not

restricted to relationships among family members. We have emphasized that the First Amendment protects those relationships, including family relationships, that presuppose ‘deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life.’⁴⁶⁷

This is also the thrust of *Lawrence v. Texas*, discussed in the next section. At the very least, *Lawrence* stands for the proposition that intimate consensual relations among adults, heterosexual or homosexual, are constitutionally protected.⁴⁶⁸ Also, if an expansive reading of the constitutional protection of privacy or “family life” means anything, it means that the Court in Puerto Rico should consider diverse family arrangements as constitutionally protected and recognize the right of individuals to shape their intimate relationships (other than the formal marital relation) with others.⁴⁶⁹

464. 416 U.S. 1 (1974).

465. *Id.* at 8.

466. 491 U.S. 110 (1989).

467. *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987) (citing *Roberts v. United States Jaycees*).

468. “*Lawrence* tells us . . . that once a ‘severe intrusion’ into a protected ‘freedom of association’ is established, not even a neutral rule of general applicability narrowly protecting an otherwise weighty state interest . . . can save the state’s usurpation of the association’s autonomy from condemnation as an infringement of substantive due process.” Laurence Tribe, *Lawrence v. Texas: The “Fundamental Right” that Dare not Speak its Name*, 117 HARV. L. REV. 1893, 1935 (2004).

469. In *Braschi v. Stahl Associates Co.*, 543 N.E.2d 49 (N.Y. 1989), the Court of Appeals of New York interpreted the term “family” in a rent control statute that protected from eviction the deceased “tenant’s family” in a functionalist and not formalist fashion. In doing so, the Court held that the term family “should not be rigidly restricted to those people who have formalized their relationship by obtaining, for instance, a marriage certificate or an adoption order. The intended protection against sudden eviction should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of *family life*.” *Id.* at 53 (emphasis added); cf. Note, *Looking for a Family Resemblance: The*

Because the relationships we form with others are part of our self-definitional process, these informal intimate relations should be recognized under privacy and human dignity principles as reflected by the Puerto Rico Constitution.⁴⁷⁰

Kenneth Karst has eloquently linked the right to form intimate associations with our interest in developing our identities.⁴⁷¹ How we choose to share our most intimate experiences is part of who we are and how we project who we are:

[f]or most of us, our intimate associations are powerful influences over the development of our personalities . . . An intimate association may influence a person's self-definition not only by what it says to him but also by what it says (or what he thinks it says) to others.⁴⁷²

Limits of the Functional Approach to the Legal Definition of Family, 104 HARV. L. REV. 1640 (1991) (arguing that despite the overwhelming optimism of commentators favoring a functional approach towards a definition of family, this approach has some limitations.) “[F]unctionalism requires that all alternative families resemble traditionally recognized relationships in function, if not in precise form. Yet functionalism offers little practical guidance to courts for comparing traditional with nontraditional relationships. Moreover, such comparisons require an intrusive judicial examination into the intimate details of the lives of individuals in nontraditional relationships.” *Id.* at 1652-53. However, the Note acknowledges that these criticisms should not be determinative in parent-child relationships. Because the focus in those situations is on the best interests of the child, these concerns with a functional approach are less problematic. *Id.* at 1655-57.

See also Siobhan Morrissey, *The New Neighbors: Domestic Relations Law Struggles to Catch Up with Changes in Family Life*, A.B.A. JOURNAL, Mar. 2002, at 37-41; Note, *Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156, 1291 (1980) (arguing for a functional approach). For a formalist position in Puerto Rico, see Pedro Silva-Ruiz, *Derecho de Familia: Más Sobre el Divorcio y los Menores de Edad*, 69 REV. JUR. U.P.R. 461 (2000). See also Álvarez González, *supra* note 298, at 458 (Professor Álvarez argues that Pérez Vega was correctly decided because, in the end, it was a case about who should govern: the legislature or the Court? In my view he poses the wrong question; instead it should be asked: who should decide issues of family relations, the individual or the government?). Finally, see Barbara Bennett Woodhouse, *Symposium “It all Depends on what you Mean by Home”: Toward a Communitarian Theory of the “Nontraditional” Family*, 1996 UTAH L. REV. 569 (1996).

[The] central claim [of “nontraditional” families] is not to autonomy from law but to collective autonomy under law. It is a claim to recognition as a legal entity—a system of shared rights and responsibilities whose ability to carry out its critical functions depends on its having the necessary powers and the requisite zone of privacy and freedom from state intervention. Autonomy under law is a key element of legal recognition of the family, and empowers those who bear the responsibility for nurturing and educating children and for caring for dependent family members. This is the “family privacy” at issue in cases like *Moore v. City of East Cleveland* and *Meyer v. Nebraska*—the right to be free of state suppression, intervention, and micromanagement in family life. This form of autonomy is one element of a larger commitment to the family as a positive social entity and involves blending large measures of privacy with appropriate doses of regulation and public support.

Id. at 582-83.

470. P.R. CONST. art. II §§ 1, 8.

471. Karst, *supra* note 102.

472. Karst, *supra* note 102, at 636; see also *Jaycees*, 468 U.S. 609. Also, and highlighting the importance of choosing those associations to the development of our personalities, Karst goes on to say that “Transient or enduring, chosen or not, our intimate associations affect our personalities and our senses of self. When they are chosen, they take on expressive dimensions as statements defining ourselves.” Karst, *supra* note 102, at 637 (emphasis added).

The *decision* to enter into marriage is profoundly self-definitional. The fact that it is relatively easy to get in and out of marriage does not make it a mere bureaucratic expedient.⁴⁷³ Instead, marriage is “a symbolic statement of commitment and self-identification.”⁴⁷⁴ The decision *not to marry* has similar implications because many couples choose cohabitation rather than marriage for ethical or philosophical reasons—often based on their own values and their personal positions about the institution of marriage.⁴⁷⁵

For all these reasons, the Supreme Court of Puerto Rico in *Pérez Vega* failed in its initial step of the analysis by not even recognizing the petitioners’ right to form their intimate association. This move by the Court, intentional or not, may have profound consequences for the protection of privacy in Puerto Rico because it forecloses the protection of other intimate activities.⁴⁷⁶

But to give constitutional protection to this unmarried couple’s family does not necessarily mean that they should have the unqualified right to adopt a child. Indeed, as Justice Stevens stated while concurring in *Zablocki*, “[w]hen a State allocates benefits or burdens, it may have valid reasons for treating married and unmarried persons differently.”⁴⁷⁷ In the same vein, the Supreme Court of Puerto Rico has repeatedly stated that cohabitation by unmarried couples does not confer, *per se*, the same rights and obligations that marriage entails.⁴⁷⁸ After all, the government in these cases is not imposing the most oppressive burdens on the unmarried couple’s intimate association—which would automatically trigger strict scrutiny—such as: actually forcing the couple into marriage, flatly prohibiting cohabitation, or prohibiting the couple from getting married. When instead the law distinguishes between married and unmarried for the purpose of allocating benefits the question, in this subtler situation, is whether the law imposes a burden on the enjoyment of the self-defining right to enter into an informal marriage to a degree that warrants strong constitutional protection.

The Court in *Pérez Vega* did not address these questions and avoided this line-drawing task; for, in its opinion, there was simply no constitutional right involved in the first place. Consequently the exclusion of unmarried couples from

473. *Id.* at 651.

474. *Id.*

475. Craig A. Bowman & Blake M. Cornish, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164, 1165-66 (1992); Ann Laquer Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381, 1386 (2001).

476. As earlier discussed, this case is methodologically problematic since it compartmentalized the scope of the right into an extremely narrow formulation, limiting its potential reach. See text accompanying *supra* note 287, *et seq.*

477. *Zablocki*, 434 U.S. at 403 (Stevens, J., concurring).

478. *Ortiz de Jesús v. Vázquez Cotto*, 119 D.P.R. 547, 549 (P.R. 1987); *Cruz v. Sucn. Landrau Díaz*, 97 D.P.R. 578, 581-82, 584 (P.R. 1969). Only after demonstrating the existence of an implied or express contract between opposite-sex intimate partners, or to remedy a possible situation of unjust enrichment, has the Court recognized some proprietary rights for the parties in a dissolving arrangement of this sort. But the Court has denied the right to claim other rights such as post separation alimony. See *Ortiz de Jesús*, 119 D.P.R. 547.

the adoption law quickly passed constitutional muster under the traditional rational review standard. The Court found the State interests in promoting the unity of the traditional family in matrimony and preventing the disintegration of that institution sufficient.⁴⁷⁹ Therefore, it held that the means selected (*i.e.*, prohibition of joint adoptions) were *rationally* related to these state interests and thus constitutional.⁴⁸⁰ However, because the law affects a fundamental right (the right to remain unmarried or to enter into an informal relationship), the Court's analysis should have taken a different route.

Although referring to the right to enter into formal marriage, and not the equally fundamental right to enter into an informal intimate relation, the Court in *Zablocki* offered a standard to make these determinations: a law is invalid if it *significantly interferes with decisions to enter into the protected relationship*.⁴⁸¹ The Puerto Rican Court in *Belk Arce* suggested a similar test when it stated that those state or private actions *that substantially impede the enjoyment* of the right to marry will be invalid.⁴⁸² This standard alone is of course imprecise. But we have some guidance. We know that, on one end of the spectrum, it is a *significant interference*, if not an outright prohibition, to limit entrance into the relationship when the state requires the payment of money without providing an exception for indigence.⁴⁸³ *Turner*, which was almost an absolute ban, is also on this side. At the other end of the spectrum, there is *Califano v. Jobst*,⁴⁸⁴ where the termination of social security benefits upon marriage was not deemed a *significant interference* with the right to enter into the protected relationship of marriage.⁴⁸⁵ In one set of situations the burden was too great, in the other it was too slight.

When the government acts to burden an informal relationship by imposing conditions or denying benefits, it discourages the entrance into the relationship and promotes the formal institution.⁴⁸⁶ Thus, “[w]hen the state burdens the relationship by refusing to grant it the same treatment that the law accords

479. *Pérez Vega*, 148 D.P.R. at 217, 221.

480. *Id.*

481. *Zablocki*, 434 U.S. at 387. To be clear, I take the standard set out in *Zablocki* because, as argued in a Harvard Law Review Note, other fundamental constitutional relations aside from marriage, such as informal marriages, should be protected in a similar way. Note, *Developments in the Law*, *supra* note 469, at 1283-93. Thus, the Note borrows *Zablocki*'s analysis and applies it to these situations.

482. *Belk Arce*, 146 D.P.R. at 226.

483. *Zablocki*, 434 U.S. at 374.

484. 434 U.S. 47 (1977).

485. In *Califano* the challenged statute that deprived child insurance benefits to a disabled individual when she got married, and the marriage was to someone outside the coverage of the act, even if that person is disabled. But beneficiaries who married other social security beneficiaries would continue to receive insurance. The Court in *Califano* held that the rules such as the denial of economic benefits were “not rendered invalid simply because some persons who might otherwise have married were deterred by the rule or because some who did marry were burdened thereby.” *Califano*, 434 U.S. at 54. In *Zablocki* the Court distinguished *Califano* holding that the denial of benefits “placed no direct legal obstacle in the path of persons desiring to get married, and . . . there was no evidence that the laws significantly discouraged, let alone made ‘practically impossible,’ any marriages.” *Zablocki*, 434 U.S. at 387 n.12.

486. Note, *Developments in the Law*, *supra* note 469, at 1293.

marriage, it interferes with the right of the individual to enter into an informal marriage.”⁴⁸⁷ But under *Zablocki* and *Califano*, not every interference (and thus not every condition or burden) is invalid. Indeed, the State has a lot of leeway in this area. Only those interferences deemed *significant* should be subjected to strict scrutiny.

How one determines whether a burden is or is not significant is a question of degree, as there is gray area between *Zablocki* and *Califano* and it all seems to depend on the criteria one uses to determine whether a particular interference is significant or not. Using the Madman’s viewpoint as the leading criterion, the burden on the right to belong to an informal marriage imposed by a limitation of adoption rights is significant because of its impact on self-definitional interests.

Karst proposes that, when the State has conditioned the enjoyment of an important benefit upon marriage, in order to evaluate its validity, close attention must be given to the way in which that condition affects the “value of intimate association as a self-identifying statement.”⁴⁸⁸ In the context of the Puerto Rican Constitutional arrangement and the recognition it should give to the value of identity definition, Karst’s substantive criterion is correct. At the center of these decisions affected by the governmental condition is precisely the ability to define one’s personality, individually and in relationship with others. That is, while the government has great flexibility to allocate the diverse benefits it offers between different types of arrangements, if its denial of benefits to one protected intimate association (like an informal marriage) interferes with the decision of the individual to enter into that relationship significantly limiting the self-defining features that entering into that relation would have provided, the state must carry a higher burden of justification. With this criterion in mind, the Puerto Rican adoption law impinges upon the interest in familial self-definition. Unable to adopt their *de facto* daughter, the plaintiffs in *Pérez Vega* had two legal options: (1) to get married, the rejection of which is the whole point of their intimate informal relationship; or (2) to have only one parent adopt the child, which would degrade their right to give form and shape to their “family life” by, among other things, limiting the legal parental bonds of the child to one parent. Either choice affects their intimate and self-defining association and burdens the core of their informal marriage.⁴⁸⁹

Since the right significantly affected is fundamental, the government should bear the burden of justification.⁴⁹⁰ But the burden should be proportional to the limitation. The State interest in preserving the unity of the family and preventing

487. *Id.*

488. Karst, *supra* note 102, at 651, 669.

489. In the continuum between *Zablocki* and *Califano* it has been argued that, for instance, a state refusal to grant alimony rights upon separation to members of an informal marriage is a significant interference. Note, *Developments in the Law*, *supra* note 469, at 1295. But this possibility has been already rejected, with little discussion, by the Supreme Court of Puerto Rico in *Ortiz de Jesús*, 119 D.P.R. at 549.

490. Note, *Developments in the Law*, *supra* note 469, at 1295.

the disintegration of that institution is, no doubt, compelling. But the means used to achieve that end should be narrowly tailored. In this sense, a complete ban on adoption by people living in a *de facto* marriage may not be narrowly tailored, since marriage *per se* is not a guarantee of stability.⁴⁹¹ Perhaps those ends could be addressed with a closer fit by imposing a heavier burden of proof upon unmarried applicants to demonstrate the stability of their relationship and that the best interests of the child will be guaranteed.⁴⁹²

The previous analysis is a proposal for further reflection. The Court in *Pérez Vega* should have considered this or any other approach that started with the recognition of a fundamental right. In any event, it serves as an illustration of how we may put into practical use the Madman's viewpoint as a substantive constitutional criterion.

D. SEXUAL ORIENTATION

*Bowers was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. Bowers v. Hardwick should be and now is overruled (Lawrence v. Texas).*⁴⁹³

Lawrence v. Texas is a watershed constitutional moment, yet in many ways it remains somewhat mysterious. For instance, *Lawrence* makes no reference to privacy as a fundamental right, although the concept of a private sphere figures prominently as the locus where the rights protected by that decision are deployed. Also, because no reference is made to the formulaic statements of a strict or a rational scrutiny, the applicable constitutional adjudication standard is diffuse, thus apparently casting doubt as to the vulnerability of other statutes relating to sexual orientation. Furthermore, it is difficult to discern the precise level of generality at which the protected liberty is defined.

491. As pointed out by Justice Naveira de Rodón dissenting in *Pérez Vega*, marriage is not a source of stability *per se*. *Pérez Vega*, 148 D.P.R. at 233-36 (Naveira de Rodón, J., dissenting). In 1994 alone there were 33,200 marriages and 13,724 divorces. *Id.* at 236 n.6. Indeed, "most adoption agencies and courts now recognize that marital status, by itself, is not an appropriate basis for determining the parental skills of a prospective adopter." 1 ADOPTION LAW AND PRACTICE §3.06[5] (Joan Heifetz Hollinger ed. 2001). Furthermore, in the *Pérez Vega* case, the applicants had been living together without the intention of getting married for about twelve years; they had other biological children together; and were found by the Solicitor of Family Relations to be a stable family. *Pérez Vega*, 148 D.P.R. at 225, 228, 238.

492. Note, *Developments in the Law*, *supra* note 469, at 1295. *But see, Lofton*, 157 F. Supp. 2d 1372 (homosexual foster parents or guardians have no recognized liberty interest in adopting children guaranteed by the Due Process Clause of the Fourteenth Amendment). The Court held that "the existence of strong emotional bonds between Plaintiffs does not inherently grant them a fundamental right to family privacy, intimate association and family integrity." *Id.* at 1379. *See also* Note, *Statutory Classifications Based on Sexuality*, *supra* note 301.

493. 539 U.S. 558, 578 (2003). For an analysis of *Lawrence*'s significance and impact, *see, e.g.*, Katherine M. Frank, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399 (2004); *Same-Sex Marriage Symposium Issue*, 18 BRIGHAM YOUNG J. PUB. L. 543 (2004); Jane S. Schacter, *Lawrence v. Texas and the Fourteenth Amendment's Democratic Aspirations*, 13 TEM. POL. & CIV. RTS. L. REV. 733 (2004); *Symposium: Gay Rights After Lawrence v. Texas*, 88 MINN. L. REV. 1017 (2004); *Symposium: Privacy Rights in a Post Lawrence World: Responses to Lawrence v. Texas*, 10 CARDOZO WOMEN'S L.J. 263 (2004).

At the same time, there is nothing ambiguous in its message. Like *Brown v. Board of Education*,⁴⁹⁴ *Lawrence* makes a powerfully crystalline cultural, political and juridical statement: to the extent that anti-sodomy laws stigmatize homosexuals by making it a crime to engage in a constitutionally protected intimate relation, such laws should not and will not stand. In a logical, though rare, blending of equal protection sentiments and liberty—i.e. self-definitional—concerns (a blend that is perhaps only parallel to *Loving v. Virginia*),⁴⁹⁵ *Lawrence* cuts through all legal formalism to assert that there is no room in our constitutional system to criminalize a subclass of citizens solely because of their sexual orientation.

There is no doubt that *Lawrence's* impact transcends the juridical field, affecting other aspects of our culture.⁴⁹⁶ Further, there is no doubt that such cultural impact has, consequently, a reciprocal effect on the law, for it provides a more comfortable context for other legal actors to extend rights and benefits to homosexuals. But this also means that the cultural and political terrain for the recognition of such rights is now, more than before, a contested power-field. *Lawrence*, in all its apparent juridical ambivalence, stirred-up an already agitated political terrain and will define the constitutional meaning of liberty for future generations. The battle has begun, and the Courts—in the U.S. and Puerto Rico—will not stay on the sidelines.

Some may see *Lawrence's* ambiguities as a baffling source of weakness. But this account, misses the entire picture. *Lawrence* left open many issues in recognizing the need for a political and juridical multi-dimensional debate to define gay and lesbian rights. “The best interpretation . . . is to see *Lawrence* as the opening bid in a conversation that the Court expects to hold with the American public.”⁴⁹⁷ While seeing the need for such discussion, at the same time, the Court built the stage and redefined the baseline for that cultural and political conversation: in an important paradigm-shift it eradicated the subjugating cultural and political effects of *Bowers*, substituting them for the liberating impact of *Lawrence*.

We are starting to see the dynamics of that contested dialogue. In the *Bowers* regime, laws linking negative civil consequences upon “sodomites” sat comfortably on the books, as a Damocles sword upon homosexuals’ peaceful existence.⁴⁹⁸ Puerto Rico still has such laws, as is the case of Art. 166A of the Civil Code, which permits denial of parental rights upon a finding that a parent

494. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

495. 388 U.S. 1 (1967); *see* Pamela S. Karla, *Foreword: Loving Lawrence*, 102 MICH. L. REV. 1447 (2004).

496. *See Post, supra* note 117.

497. *See id.* at 104; *see also* Marybeth Herald, *Bedroom of One's Own: Morality and Sexual Privacy after Lawrence v. Texas*, 16 YALE J. L. & FEMINISM 1, 38-39 (2004).

498. “*Lawrence* had the effect of disintegrating one of the classical arguments against homosexual marriage, that is, that American constitutional law had validated the criminalization of homosexual relations.” Glenda Labadie Jackson, *Deshojando Margaritas: Un Recuento Histórico del Re-*

has engaged in sodomy (not necessarily by committing the crime).⁴⁹⁹ In the post-*Lawrence* juridical and political world, such laws are of doubtful validity inasmuch as the basis for the differential treatment (criminal sodomy) is unconstitutional. Other aspects of this judicial battlefield are not necessarily the direct legal consequences of *Lawrence*. Rather, and perhaps more importantly, they are products of the cultural baseline-shifting effect of the decision. Shortly after *Lawrence*, the Massachusetts Supreme Court recognized as a matter of state constitutional law the right of same-sex partners to marry,⁵⁰⁰ and more recently the New Jersey Supreme Court mandated the State legislature to create a mechanism for same-sex partners to receive all the benefits of marriage.⁵⁰¹ As of this writing there are twelve lawsuits pending in six other states where the constitutionality of opposite-sex marriage is questioned.⁵⁰² At the same time, immediately following *Lawrence*, three separate courts upheld several anti-gay state statutes.⁵⁰³ A federal court upheld a Florida statute that denied adoption rights to homosexuals;⁵⁰⁴ the Arizona Court of Appeals validated that state's opposite-sex traditional marriage statute;⁵⁰⁵ and the Kansas Court of Appeals sustained a law that imposed higher sentences for prohibited sexual acts between a minor and an eighteen year-old when such acts are engaged by same-sex persons rather than opposite sex partners.⁵⁰⁶ Concurrently, laws in many states and the U.S. Congress declaring that marriage is exclusively a heterosexual institution are legion.⁵⁰⁷ And even a failed proposal for a constitutional amendment to such ends was introduced in the U.S. Congress.⁵⁰⁸

conocimiento Jurídico del Matrimonio Homosexual en los Estados Unidos de América, INDRET, Apr. 2006, at 345, available at http://www.indret.com/pdf/345_es.pdf.

499. P.R. LAWS ANN. tit. 31 § 634a(8)(d) (1993 & Supp. 2004). ("The grounds, be it by commission or omission, for which a person may be deprived restricted or suspended of the patria potestas of a son or daughter are the following: . . . To incur conduct which, if criminally prosecuted, would constitute . . . [s]odomy").

500. Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass. 2003). On February 4, 2004, the Supreme Judicial Court of Massachusetts clarified to the Senate of Massachusetts that the state Constitution required that homosexuals be given the same right as heterosexuals to marry, and not simply be bonded by a civil union. "The dissimilitude between the terms 'civil marriage' and 'civil union' is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status." *Id.*; see also Opinions of the Justices to the Senate, SJC-09163, February 3, 2004, available at <http://news.findlaw.com/wp/docs/conlaw/maglmarrige20304.html> (last visited on Sept. 19, 2007).

501. Lewis v. Harris, 188 N.J. 415 (N.J. 2006).

502. See Labadie, *supra* note 498 at 8; DOMAwatch.org, Current Legal Challenges/Recent Decisions, <http://www.domawatch.org/currentchallenges.html> (last visited May 3, 2008).

503. See Nan D. Hunter, *Sexual Orientation and the Paradox of Heightened Scrutiny*, 102 MICH. L. REV. 1528, 1532 (2004).

504. Lofton v. Sec'y of Dep't of Children and Family Servs., 358 F.3d 804 (11th Cir. 2004) (upholding Florida's adoption statute).

505. Standhart v. Superior Court of Maricopa County, 77 P.3d 451 (Ariz. Ct. App 2004).

506. State v. Limon, 83 P.3d 229 (Kan. Ct. App 2004).

507. See Defense of Marriage Act, 28 U.S.C.A. § 1738C (West, WESTLAW through P.L. 110-207); Labadie, *supra* note 498, at 9. For state enactments of local DOMA legislation, see www.domawatch.org (last visited May 3, 2008).

508. See Labadie, *supra* note 498, at 12.

In this contested milieu, we must examine *Lawrence*'s legal implications and define its place in the substantive due process constitutional doctrine. We will find that *Lawrence* represents the crystallization of doctrine in the important respect that we have seen in this Article: *Lawrence* ratifies identity definition values as a paramount concern for the Constitution and vindicates the Madman's plight in the decision-making context. More importantly, we must examine the extent to which *Lawrence* may have broader implications that transcend criminalization of same-sex sexual relations, extending to other legal dimensions such as family law. If *Lawrence* does not extend to such lengths, we must understand why; to the extent that we identify what elements in *Lawrence* may limit such broad reach, we must examine whether such limits are consistent with Puerto Rico's constitutional protection of privacy and human dignity seen through the aegis of the Madman's fundamental interest in identity definition.

1. *Lawrence*'s (not so) hidden meaning

While declaring the Texas anti-sodomy criminal statute unconstitutional, the Supreme Court in *Lawrence* held that “[t]he Texas statute furthers no *legitimate state interest* which can justify its intrusion into the personal and private life of the individual.”⁵⁰⁹ Given that the Court never actually characterized the challenger's right or interest as “fundamental” (a label that in constitutional doctrine triggers strict scrutiny), it is easy (in fact, too easy) to conclude that the Court actually applied the more relaxed rational scrutiny standard. If this is the case, it may be argued, *Lawrence* means that “ethical and moral principles”⁵¹⁰ may never be considered legitimate state interests even under the more deferential rational review. *Ergo*, the parade of horribles follows the slippery slope:⁵¹¹ every law regulating sexual practices that are based exclusively on morality will have to fall.

Justice Scalia, dissenting in *Lawrence*, expressed such concern:

The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are “immoral and unacceptable,”—the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity *Bowers* held that this was a legitimate state interest. The Court today reaches the opposite conclusion

509. *Lawrence*, 539 U.S. at 578.

510. *Id.* at 572.

511. For an interesting reflection on the risk of slippery slopes in judicial arguments, specifically when crafting new principles, see Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1100 (2003) (“A particular decision A might rest on a limited principle that on its own terms doesn't authorize a future decision B But this limitation might ultimately prove inadequate, and A might cause B in spite of the Justice's attempts to prevent such slippage.”). See also Ruth Sternblitz, *Raining on the Parade of Horribles: Of Slippery Slopes, Faux Slopes, and Justice Scalia's Dissent in Lawrence v. Texas*, 153 U. PA. L. REV. 1097 (2005).

This effectively decrees the end of all morals legislation. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a legitimate state interest, none of the above-mentioned laws can survive rational-basis review.⁵¹²

Scalia's worries are, however, doctrinally misplaced. The potential effect *Lawrence* may have on some laws has nothing to do with the discrediting of morality as a legitimate basis for legislation within rational basis review. The Court's holding and its real potential impact may be understood once we grasp the flaws in Scalia's reasoning.

First of all, there is no doubt that the right claimed by the statute's challengers is situated within the doctrinal universe of the fundamental right to privacy, as part of the substantive protection of liberty in the Fourteenth Amendment. Instead of "inventi[ng] . . . a brand-new 'constitutional right,'"⁵¹³ the Court recognized that "the most pertinent beginning point is our decision in *Griswold*."⁵¹⁴ The Court, Tribe states, "developed its substantive due process jurisprudence in a way that connected *Lawrence* with the long line of decisions that described the protected liberties at higher levels of generality than any 'protected activities' catalog could plausibly accommodate . . ."⁵¹⁵ Following these doctrinal steps, the Court concluded, citing *Casey*, that "there is a realm of personal liberty which the government may not enter."⁵¹⁶

But what constitutes the character and extension of that "personal liberty" is, of course, the harder question. Suffice it to say at this point that, whatever the contours of that dimension of liberty, such interest is at the same level of importance as other fundamental rights, thus triggering strict scrutiny. To be sure, "the Court's opinion indeed invoked the talismanic verbal formula of substantive due process but did so by putting the key words in one unusual sequence or another—as in the Court's declaration that it was dealing with a 'protection of liberty under the Due Process Clause [that] has a *substantive* dimension of *fundamental* significance in defining the rights of the person'."⁵¹⁷

In terms of the applicable scrutiny, *Lawrence* then presents no innovation: a law that affects a fundamental liberty under the Due Process Clause can only be sustained when the government pursues a compelling interest with such law. In this sense, even when morality may serve as a legitimate basis for conventional legislation, when a fundamental right is at stake, morality alone will not do. In the face of a fundamental right, morality is not a legitimate justification. The fact that the Court was not inclined to follow a formalistic path means that its decision is not aimed at lawyers alone; instead, *Lawrence* speaks to all social dimensions at

512. *Lawrence*, 539 U.S. at 599 (Scalia, J., dissenting).

513. *Id.* at 603.

514. *Id.* at 564 (majority opinion); see Tribe, *supra* note 468, at 1917.

515. Tribe, *supra* note 468, at 1934.

516. *Lawrence*, 539 U.S. at 578.

517. Tribe, *supra* note 468, at 1917 n.84 (emphasis added).

once with a clear discourse unimpeded by the legal field's doctrinal barriers.

The other, and more important, question has to do with the nature and character of the fundamental right affected by the Texas statute. *Lawrence* is mysterious and to some extent contradictory. On one hand, the right protected clearly belongs to the common theme that unites other decision-making privacy cases at a high level of generality (identity-definition). On the other, it sends mixed signals as to the reach of such liberty interest: at times it seems to constrain the right to relations in private settings (similar to *Griswold*'s emphasis in the intimate marital relation), while occasionally it seems to project it to a higher level of generality extending it to all dimensions of society (similar to *Eisenstadt*'s rupture with *Griswold*'s focus on intimacy). This ambiguity is precisely the seed from which the contested judicial and cultural battlefield for gay rights will grow. If *Lawrence* is not limited to the private realm, or if state courts construe their constitutions akin to an expansive reading of *Lawrence*, then laws that disfavor homosexuals for belonging to a constitutionally protected intimate relationship will have to carry a heavier burden of justification.

Contrary to the Georgia sodomy statute validated in *Bowers v. Hardwick*⁵¹⁸ the Texas statute scrutinized in *Lawrence* was not aimed solely at the practice of certain sexual acts regardless of the participant's sex; instead, the law made it a crime for two persons of the same sex to engage in intimate sexual conduct, even when such conduct was not criminal when engaged by opposite sex partners.⁵¹⁹

To the extent that the Texas statute selected homosexuals alone for this particular hardship, the most obvious route for the Court to take was the Equal Protection Clause of the Fourteenth Amendment. In fact, this was precisely Justice O'Connor's angle.⁵²⁰ It is settled law in constitutional doctrine that, under rational basis review, laws that distinguish among groups are constitutional as long as the governmental justification for that classification is legitimate and the law bears a rational relation to that end.⁵²¹ However, a "bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest"⁵²² even for purposes of this rational basis review.⁵²³ To the extent that only homosexuals were prohibited from engaging in certain sexual acts, the challenged statute was clearly based on animus toward that particular group lacking, thus, a legitimate justification.

518. 478 U.S. 186 (1986).

519. The Texas statute provides that "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." Tex Penal Code Ann. § 21.06(a) (Vernon, WESTLAW through 2007 Reg. Sess.). While "deviant sexual intercourse" is defined as "any contact between any part of the genitals of one person and the mouth or anus of another person; or the penetration of the genitals or the anus of another person with an object." *Id.* § 21.01(1).

520. See *Lawrence*, 539 U.S. at 579 (O'Connor, J., concurring).

521. *Williamson*, 348 U.S. 483.

522. *Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973).

523. *Romer v. Evans*, 517 U.S. 620 (1992) (discrimination on the basis of sexual orientation); *Cleburne v. City of Cleburne*, 473 U.S. 432 (1985) (discrimination against the mentally challenged); *Moreno*, 413 U.S. 528 (discrimination against hippies).

Nevertheless the Court refused to follow that road. A holding in that direction would have left vertebral issues unresolved. "Were we to hold the statute invalid under the Equal Protection Clause, some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants."⁵²⁴ Instead, the Court decided to follow the substantive due process path while underscoring one of its main preoccupations: the discriminatory and stigmatizing power of sodomy statutes (however crafted).

Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.⁵²⁵

Eradicating the stigmatizing effects of anti-sodomy statutes through a direct substantive approach required overruling *Bowers* and resetting the discursive starting point for generations to follow.

Lawrence recognizes an individual fundamental right to decide whether to form intimate personal bonds with others, regardless of whether such choices concern sexual activity with an individual of the same or opposite sex. "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexuals the right to make this choice."⁵²⁶

Lawrence's reach is, however, unclear. There are many statements defining the nature and character of the protected right broadly within identity-definition interests at any societal level and not just within a private sphere. That is, *Lawrence* seems committed to protect individuals engaging in certain intimate associations from state intrusions regardless of whether such invasions occur in the most private settings of the home or whether they occur at broader social dimensions. The decision's opening phrases give us a glimpse into this possibility:

Liberty protects the person from unwarranted government intrusions

524. *Lawrence*, 539 U.S. at 575.

525. *Id.*

526. *Id.* at 567.

into a dwelling or other private places. In our tradition the State is not omnipresent in the home. *And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds.* Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. *The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.*⁵²⁷

“Freedom extends beyond spatial bounds.”⁵²⁸ Thus, it located *Lawrence* alongside *Eisenstadt*’s overarching general principle that “[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person,”⁵²⁹ and combined it with *Casey*’s identity-definition principle that “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”⁵³⁰

And in fact, *Lawrence* explicitly framed the rights involved exactly in those unqualified terms. Just as the woman’s decision in *Casey* to terminate her pregnancy is not simply about killing a baby and *Griswold* and *Eisenstadt* are not just about ingesting a pill—but rather are part of an individual right to define our concept of existence— “[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.”⁵³¹ Similarly, the Court adopted Justice Stevens’ unqualified dissent in *Bowers* summarizing the general propositions that emerged from substantive due process’s case law:

individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of “liberty” protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.⁵³²

This analysis, stated the Court, “should have been controlling in *Bowers* and should control here.”⁵³³

These holdings have important implications for the life span of other laws that treat homosexuals in a substantively different manner than heterosexuals. To the

527. *Id.* at 562 (emphasis added).

528. *Id.*

529. *Eisenstadt*, 405 U.S. at 453 (in that case, the decision whether to “bear or beget a child.”).

530. *Casey*, 505 U.S. 833.

531. *Lawrence*, 539 U.S. at 574.

532. *Bowers*, 478 U.S. at 216.

533. *Lawrence*, 539 U.S. at 578.

extent that those regulations negatively affect homosexuals simply because they choose to enter into a constitutionally protected intimate association, those laws are of doubtful validity. Especially when one considers that *Lawrence's* logic intertwines substantive due process with equality concerns. As Robert Post has stated:

If *Lawrence* believes that the function of the Due Process Clause is "to demand respect for conduct protected by the substantive guarantee of liberty," if the constitutional guarantee of liberty attaches to homosexual relationships, and if legislation denying homosexual relationships official recognition relegates them to second-class status, state discrimination against the public dimensions of homosexual relationships would seem to violate the very essence of the constitutional guarantee.

The logic of *Lawrence* thus has exceedingly far-ranging implications. It would seem to render constitutionally suspicious at least as broad a range of legislation adversely affecting homosexuals . . .⁵³⁴

The Court seems cognizant of this possibility. Thus, it went to great lengths to limit *Lawrence's* reach especially in light of the debate for same-sex marriage recognition.

The Court emphasized the challenged law's impact on *private* contexts and limited the decision's reach to avoid conflict with heterosexual marriage.

[Sodomy laws] have . . . far-reaching consequences, touching upon *the most private human conduct, sexual behavior, and in the most private of places, the home*. The statutes do seek to control a personal relationship that, *whether or not entitled to formal recognition in the law*, is within the liberty of persons to choose without being punished as criminals.

This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries *absent injury to a person or abuse of an institution the law protects*. It suffices for us to acknowledge that adults may choose to enter upon this relationship *in the confines of their homes and their own private lives and still retain their dignity as free persons*.⁵³⁵

If we reread this passage *without the italicized phrases* it becomes clear that the Court realized the potential impact of the decision and that it limited substantive due process' reach to other demeaning State practices upon same-sex intimate relations. The Court thus placed itself at a crucial crossroad, perhaps waiting for the cultural and juridical conversation to mature. In the end "[it] will have to

534. Post, *supra* note 117, at 104.

535. *Lawrence*, 539 U.S. at 567 (emphasis added).

develop either the logic of private liberty or the logic of public respect.”⁵³⁶ The question is, then, on which side of this conversation should the Puerto Rico Constitution be? Perhaps our friend the Madman has something relevant to say. I bet he does.

2. Same-sex intimate associations in Puerto Rico

In light of Puerto Rico’s protection of human dignity and privacy, the Supreme Court should simply hold that, regardless of sexual preference, individuals have an unqualified right to enter into intimate consensual relations among adults, precisely because through those relationships people define their identity.⁵³⁷ Therefore, same-sex relationships should be on equal footing with opposite sex intimate relations.

In the previous section I examined identity-definition as a criterion to scrutinize state legislation that disfavors constitutionally protected associations by denying such relations certain benefits provided to others. I analyzed that problem by looking at the denial of adoption rights to unmarried couples. To the extent that such associations are protected as fundamental precisely because through those relationships people define important aspects of their identities, laws (either prohibitions or benefit denials) that interfere with the individual decision to enter into that self-defining relationship should be constitutionally suspect when they significantly limit the self-defining features that entering into that protected relation provides.

Such is the case with the denial of adoption rights to same-sex couples and same-sex marriage. Because the law in Puerto Rico conditions adoption upon heterosexual marriage, gays and lesbians interested in forming a legally complete family with a child can only do so through a heterosexual relation. This significantly burdens their protected intimate association by denying them, as a couple, the choice to form a richer, intimate, self-defining, familial association with a son or daughter. Theoretically, one person could marry another of an opposite sex in order to be eligible to form a family through adoption; this option, however, is an obvious limit to his or her right to engage in a same-sex intimate relation. Also, one of them could adopt a child and informally build a family together with his or her partner. But, as is the case of adoptions in the informal heterosexual marriage context, that would limit the legal parental bonds of the child to one parent, severely curtailing their fundamental choice to form and give shape to their intimate relations as a family. When the law forces individuals to choose between two self-defining intimate associations (either same-sex relations or family bonds with adoptive children) then the law is substantially and impermissibly affecting the individual’s decision to enter into one of those self-defining relations. When such choice is forced upon same-sex couples while

536. Post, *supra* note 117, at 106.

537. See *supra* Part I.D.1; see also *supra* text accompanying notes 99-110.

opposite-sex couples are able to enter into both relationships simultaneously, thus having more options on how to develop their self-defining relationships, equality concerns connect to the Madman's self-defining liberty interests, making the law even more vulnerable to attack.

Marriage presents a similar case. The decision not to marry⁵³⁸ is as self-defining as the decision to marry⁵³⁹ or to have an informal intimate relation with others.⁵⁴⁰ Even when same-sex couples can form an intimate relationship without having to marry, they are not able to access the intricate web of legal protection, social recognition and stability tied to marriage or any other similar civil union. That is, while opposite-sex couples may form the same non-marital intimate relations that same-sex couples form, heterosexuals have the option of attaching to that relationship an entire set of benefits that, for many, gives the relationship increased stability. To deny that possibility to same-sex couples imposes a severe limitation upon that constitutionally-protected relation. As is the case with the prohibition on same-sex adoptions, opposite-sex marriage impedes homosexuals from forming a more solid intimate association. If same-sex intimate relations are protected as fundamental, there is no reason why the State could burden such relationships by denying them the option to form other, more secure, intimate relations.

Of course, I am mainly looking at these instances of benefit-denials through the Madman's perspective, and the effect of these laws on the Constitution's substantive protection to identity-definition values. Other, non-exclusive approaches are available. We must not forget that *Lawrence*'s forcefulness comes not only from its effort to raise the constitutional level of generality of liberty as protected by the Due Process Clause; *Lawrence*'s discursive and juridical impact stems also from its effort to eradicate the stigmatizing effect of laws upon homosexuals engaging in a constitutionally protected relation. As a result, there are analytical avenues unexplored in this Article that come from the equality standpoint and the Constitution's promise of just and equal treatment for all. These avenues must not be ignored.

Thus, one may reason that it is not justified to deny a person benefits granted to others equally situated when the basis for such denial is simply the exercise of a constitutional right to engage in an intimate association, especially when those distinctions perpetuate and reproduce outmoded and degrading views of homosexuals. One may also reason that, even under the more traditional and relaxed standard of review, such discriminations are arbitrary and capricious either because they are motivated by animus toward a politically unpopular group⁵⁴¹ or because they simply lack a legitimate state interest.⁵⁴²

538. *Figueria Ferrer*, 107 D.P.R. 250.

539. *Zablocki*, 434 U.S. 374; *Meyer*, 262 U.S. 390.

540. *Lawrence*, 539 U.S. 558.

541. *Romer*, 517 U.S. 620; *Cleburne*, 473 U.S. 432; *Moreno*, 413 U.S. 528; see also *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) (as applied to a "class of one").

542. See *Goodridge*, 798 N.E.2d at 959 (declaring unconstitutional the state prohibition on same-sex marriage based on "the individual *liberty* and *equality* safeguards of the Massachusetts Constitution.").

FINAL REMARKS

Efforts to define the most central aspects of our identity should be protected from governmental attempts to either *steal our masks*—by hindering self-defining processes—or *impose new ones*—by directing such efforts. To the extent that we are contextually-situated selves our masks cannot be entirely our own.⁵⁴³ But the Constitution recognizes our struggle to give shape to the way we see the world and ourselves and to control how the world sees us in a manner that can be said to be sufficiently ours.⁵⁴⁴

The rights to privacy and human dignity in Puerto Rico—even if multi-dimensional and contextual—afford protection to these interests. In light of governmental and private attempts to stifle self-definitional efforts, the Puerto Rico Constitution demands from the Supreme Court zealous vigilance, reasoned justification (with an independent analytical vigor at an adequate level of generality), and disciplined restraint from the attractive temptation to simply adhere to federal constitutional guidelines. If, for instance, specific instances of abortion regulation and living-will requirements are scrutinized in Puerto Rico, courts should evaluate them under this aegis by seriously taking into account self-definitional interests. The impact of benefit denials upon constitutionally protected self-defining relations should also be seen through this perspective.

Indeterminacy, of course, haunts this argument. In Rubenfeld's words, "where is our self-definition not at stake? Virtually every action a person takes could arguably be said to be an element of self-definition."⁵⁴⁵ How will the Courts be

(emphasis added); *see also*, Lewis, 188 N.J. 415 (recognizing same-sex couples have the same benefits as opposite-sex partners on state equal protection grounds).

543. STANLEY FISH, DOING WHAT COMES NATURALLY 346 (1989) ("Anti-foundationalism reveals the subject to be always and already tethered by the local community norms and standards that constitute it and enable its rational acts. Such a subject can be many things . . . [b]ut the one thing it cannot be is free to originate its own set of isolated beliefs without systematic constraints.").

544. TRIBE, *supra* note 29, § 15-2 at 1305-06.

545. Rubenfeld, *supra* note 27, at 754-55. For Rubenfeld, governmental activities struck down in the name of privacy are objectionable because "they affirmatively and very substantially shape a person's life; they *direct* a life's development along a particular avenue. These laws do not simply proscribe one act or remove one liberty; they inform the totality of a person's life." *Id.* at 784 (emphasis added); *see also* JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 221-55 (2001). Of course, Rubenfeld's important contribution cannot be ignored; but it is not incompatible with the views here exposed. They are entirely harmonious: one is positive, the other negative. In fact, the anti-totalitarian thesis can be subjected to the same indeterminacy critique that *Rubenfeld* holds against the personhood concept; for how "substantially" a law must direct a person's life in order to be totalitarian is not clear either. In other words, "when is a law not directing our lives in some way?" These are, of course, questions of degree.

For a critique of Rubenfeld's other argument that personhood theses end up favoring essentially immutable positions about sexuality, see Karen Struening, *Privacy and Sexuality in a Society Divided Over Moral Culture*, 49 POL. RESEARCH QTLY. 517 (1996) ("We can speak of the centrality of sexuality to self-definition without striving for a stable or true identity based on knowing the truth of our sexual selves. Instead, we can claim the sexual freedom is necessary to the experiments in the course of which we intend to refuse one self-formation and create another."). *See also* DANIELSEN & ENGLE, *supra* note 88; WILLIAM RUBENSTEIN, SEXUAL ORIENTATION AND THE LAW (1997); Janet E. Halley, *Reasoning About*

able to balance legitimate governmental regulation of individual relations with self-definitional interests?

When self-definition is involved is a matter for the Puerto Rico Supreme Court to decide as it discharges its duty to interpret the Constitution in light of its text and history. Such indeterminate contingencies are at the core of constitutional interpretation but that, in and of itself, should not deter the Court from elaborating on its reasoning. The goal here is to provide an analytical framework for the Court to approach decision-making privacy claims.⁵⁴⁶ This is, no doubt, a political argument, nothing more ambitious. And it is, after all, where the Madman meets the Bad Man.⁵⁴⁷

Sodomy: Act and Identity in and After Bowers v. Hardwick, 79 VA. L REV. 1721 (1993); Thomas, *supra* note 89.

546. Why, for instance, identity-definition interests are implicated when the law denies adoption rights to unmarried couples while offering to it married couples, but such interests are not necessarily involved when post-divorce alimony rights are denied to unmarried couples, is contingent upon many factors including value-laden policy considerations. It should be clear, though, that in each case self-definitional interests are affected in diverse ways and to different degrees. Not being able to form a full-fleshed family is not the same as not being able to receive post-separation alimony. The way we define who we are in relation to our loved ones is profoundly affected in the former, not necessarily in the latter.

547. Oliver Wendell Holmes, *The Path of The Law*, 10 HARV. L. REV. 457 (1897).

